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No. 6109

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

CHRIST LUAMA,

Appellant,

vs.

BUNKER HILL and SULLIVAN MINING and CONCENTRATING COMPANY, a corporation; FEDERAL MINING and SMELTING COMPANY, a corporation; HECLA MINING COMPANY, a corporation,

Appellees.

Brief of Appellees

Upon Appeal from the District Court of the United States for the District of Idaho, Northern Division

---

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Appellees.

BRIEF OF APPELLEES

STATEMENT OF THE CASE

Appellees are not content to accept the statement of the case appearing in the brief of the appellant.

For a true and complete statement of the case appellees invite the attention of this Honorable Court to the bill of exceptions (R. p. 55.) which after being re-drafted so as to include the amendments of appellees to the proposed bill of exceptions of appellant, contains the files, records and proceedings upon which the District Court rendered its judgment.

Inasmuch as that part of appellant's statement of the case which refers to the contents of the Brown indenture,

a copy thereof being annexed to the answer as Exhibit "A", omits many important parts of such indenture, and provisions thereof necessary for its interpretation having also been omitted in parts of the argument in appellant's brief, and which do not appear to have been considered by him in his review of this indenture, appellees have concluded, for the convenience of this Court and in support of their claims for such indenture, to reproduce it in the argumentative part of this brief.

Furthermore, there was inserted into appellant's statement of the case relative to his offers of proof as to taxation of the indenture language not found in such offers of proof, and which the author knew was not a part of such offers of proof.

Such inserted language appears in the last paragraph of page 13 of appellant's brief, as follows: *"and maintained that such instrument did not convey a taxable interest in land,"* and *"were not taxable and"*. That language was never submitted to the District Court, never constituted a part of such offers of proof and should not have been inserted into the statement of the case.

ARGUMENT

No extended reference will be made to the text and decisions of the courts referred to in appellant's brief since such text and decisions are not in point and are not applicable to the issues and the easement appearing in the record.

The written instrument, a copy of which is annexed to the answer as Exhibit "A", and which instrument for convenience is hereinafter referred to as the Brown in-

denture, appellees claim to be a release and easement, and they are supported in such claim by the decision of Judge Dietrich and the decision of this Court later referred to in this brief.

The argument in appellant's brief is opened with the question as to what the Brown indenture is: "Is it an easement, an easement in gross, a release and permit or a license?"

It appears from his brief that appellant has not been able to answer that question. The best that can be concluded from the language of his brief is that if there had been omitted from the indenture certain facts and matters, appearing therein, it would not be an easement; that if it did not create a certain estate, which it does create, it might be an easement in gross; that if it granted only a certain personal privilege, it might be a permit; and that if it did not make servient certain property, which it does make servient, it might be a license.

A reading of the Brown indenture forces the conclusion that it is a release and easement against the claim asserted by appellant in his amended complaint, and meets every requirement of every definition of an easement quoted in appellant's brief.

It is imposed upon corporeal property of Brown; it is imposed for the benefit of corporeal property of appellees; it describes and defines the servient estate of Brown and the dominant estate of appellees.

The Brown indenture grants and conveys to appellees and their successors and assigns forever, for the benefit of their corporeal property (their mines and mills), the right and privilege to carry on and continue in the

Counties of Shoshone and Kootenai, State of Idaho, the operations of their mines and mills (their corporeal property), to use the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries (which waters are corporeal property) in such operations, to dump all tailings, waste material and debris (corporeal property) that may result from such operations into those rivers, tributaries and along their banks (corporeal property), and to use the waters of those rivers and tributaries for the transportation and carrying away of all such tailings, waste material and debris; and all of the property which the appellant claims in this action, (corporeal property), Brown by his indenture made servient to said right and privilege of appellees, and in such indenture there was described a dominant estate in the appellees and a servient estate in Brown.

The contention in appellant's brief that Brown could not grant and convey such rights and privileges to appellees because they always had and possessed them is an admission of the existence of the dominant estate in the appellees, and is a complete refutation of any assertion in such brief that such dominant estate did not exist.

Starting with that admission, that appellees always had and possessed that dominant estate, there cannot be any denial by appellant that the property he now claims was by the Brown indenture subjected to and charged with such dominant estate, or any denial by him that such indenture made all the estate which he claims in such property a servient estate, or any denial that the Brown indenture is an easement on such property which creates in appellees an interest and estate therein.

In its terms, provisions and covenants the Brown indenture contains every quality of an easement as enumerated by the decisions of the Courts and by the text-writers. The rights, privileges and uses described in such indenture are property rights, privileges and uses, and in that indenture the property claimed by appellant is made servient to such property rights, privileges and uses.

By definition and decision to make "subject to" is to make "servient to."

The long quotation from the opinion of Justice Curtis in Howard v. Ingersoll, 13 How. 381, found on pages 28 and 29 of appellant's brief, defining what the banks of a river are, is mere surplusage and has no application to the matters for consideration on this appeal, and the language of Judge Rice in the Miller case, 35 Ida. 669; 209 Pac. 194, quoted and italicized in appellant's brief, to the effect that certain deeds purporting to convey title to a portion of the bed of a river are void, is equally inapplicable in this action.

Nowhere in his indenture does Brown mention the bed of any river. There is a vast difference between an attempt to grant and convey the bed of a river and a grant and conveyance of rights and privileges for the use of the waters of rivers and tributaries in the great and necessary mining and milling operations complained of in this action.

Much of the brief of the appellant is devoted to the contention that Brown could not convey to the appellees the rights, privileges and uses relative to the waters of the rivers and tributaries, mentioned in his indenture, because he did not have title to such waters. Such contention overlooks the fact that the exercise of such rights, privi-

leges and uses by appellees furnished the basis for the claim of Brown that his property had depreciated in value and been damaged, and also is the foundation for the claim asserted by the appellant in this action.

It has been the contention of appellees in previous litigation, that under the Constitution of Idaho, the property involved in this action was servient to the property right in appellees to use the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in their mining and milling operations, which included the use of such waters for the transportation and carrying away of the tailings, waste material and debris produced in such operations, even though in such transportation and carrying away such tailings, waste material and debris might be carried upon such property.

If such a contention had been upheld in this action appellees would have been entitled to a dismissal.

To protect themselves against an adverse decision upon that contention and against just such a claim, on account of such use, as might be asserted by Brown or by his assigns as is asserted in this action, the Brown indenture was executed to appellees for a valuable consideration, satisfactory to Brown and concerning which he has never made any complaint or objection so far as this record discloses.

If the Constitution of Idaho does not make such property servient to such use, then to deny to Brown the right to create such serviency amounts to a denial to appellees of a complete defense in this action. To create such serviency Brown granted and conveyed to appellees the right and privilege of such use, and by such grant and convey-

ance made his property subject to and charged it with that use.

While it is true that the common law doctrine of riparian rights does not exist in Idaho, while it is true that Brown had no title to the bed of the Coeur d'Alene River below ordinary high water mark, it is not true that he could not grant and convey to appellees the right and privilege to use such waters in their mining and milling operations and in the transporting and carrying away of the tailings, waste material and debris resulting from such operations, and by such grant and conveyance make his property subject to and charge the same with such use. If Brown could not make such grant and conveyance, which relieved appellees from his claim for damages on account of such use and from all damages and injuries consequent upon such use, he could not maintain any action for the recovery of any damages resulting from such use.

However, Brown could and did make such grant and conveyance. He certainly could and did, by the terms, provisions and covenants of his indenture, make his property servient to all of the rights, privileges and uses in appellees and their successors and assigns enumerated and described in such indenture, which included the right and privilege of having the tailings, waste material and debris produced by the appellees in their mining and milling operations transported and carried by the waters of the Coeur d'Alene River down to and upon his property.

Appellant had notice and knowledge of the Brown release and easement from the date it was recorded on May 24, 1911, and at the time he claims to have purchased

the property described in that release and easement, and he had no right to maintain this action which was properly dismissed by the District Court.

The Brown indenture, being an easement upon his property and creating an interest and estate in the appellees in such property, could be recorded and was recorded under the recording statute of Idaho, and is conclusive against the appellant, as will hereinafter more fully appear.

That such easement was for the benefit of the mining and milling properties of appellees there can be no doubt or question. They could not operate their mines and mills without the use of the waters, mentioned in the easement, in such operations and the use of such waters in the transportation and carrying away of the tailings, waste material and debris produced in those operations.

Brown complained of those operations and uses and claimed that the same depreciated the value of and damaged his property, and being willing for a consideration to permit those operations and uses to be continued by appellees and their successors and assigns granted and conveyed to them the right and privilege of such continuance, and made his property forever servient to the continuance of such operations and uses, and released and discharged the appellees and their successors and assigns from all damages and claims of damages to his property resulting from, caused by and consequent upon the continuation of such operations and uses.

There is no text or decision cited in appellant's brief showing that any written instrument containing such

terms, provisions and covenants as the Brown indenture is not an easement, or that it is an easement in gross, a permit or a license.

It is repeated that tested by the requirements of the elements that constitute an easement, as announced by the text and decisions found in appellant's brief defining an easement, the Brown indenture satisfies those requirements and is an easement.

It is stated in appellant's brief that in the deed of Brown no mention was made of the Brown indenture, and from that it is argued that Brown did not construe his indenture to be an easement.

Surely what Brown did not do and what he did not say is incompetent and immaterial to show his interpretation of his indenture.

Let us turn to what he did do: By the terms, provisions and covenants of his indenture he granted and conveyed an easement to appellees, which indenture is so clear, certain and unambiguous as to make impossible any other conclusion than that he intended to and knew that he did make his property subject and servient to such easement and to all of the rights, privileges and uses mentioned and described therein.

It is the settled law of the land that whatever Brown did or said to third parties relative to his easement is entirely incompetent to show his understanding and interpretation of his easement, and the same law applies to what it is claimed the agents, attorneys and employees of the appellees said or did in respect to the assessment for taxing purposes, the taxation of, or the payment of taxes on such easement.

There have been made in appellant's brief unprovoked and meritless attacks upon appellees unsupported by the record, and in connection with such attacks there has been inserted in such brief much matter not found in the record, not a part of the offers of proof of appellant and never submitted to the District Court.

It is not believed that such practice is fair to the District Court or just to appellees.

In this connection reference is had to pages 85 and 86 of the record as to the offers of proof at the trial relative to agents, attorneys and employees of appellees. The following is a summary of such offers of proof:

That the agents, attorneys and employees of defendants (appellees) protested against the instrument (Brown indenture) being listed for taxation or assessed and taxed to said defendants; that said attorneys, agents and employees appeared, a number of times, before the County Commissioners and taxing authorities of Kootenai County, Idaho, and protested against the same being assessed and taxed against the said defendant companies, and also appeared before the Attorney General of the State of Idaho, and at a special conference with said Attorney General requested said Attorney General to notify the taxing authorities of Kootenai County, Idaho, that same should not be taxed to said defendants.

That after the commencement of this action and some twelve or fifteen other actions involving the same question, and like instruments, and damage to land and crops on the Coeur d'Alene River, as herein involved, the assessor of Kootenai County, Idaho, listed for taxation said instrument and other like instruments, and thereupon

a tax was levied and assessed upon said instruments in the sum of $3220.78, the value thereof being fixed for the purpose of taxation in the sum of $81,897.00. That said tax in the sum of $3220.78 was paid on the 12th day of December, 1928. That for the year 1929 the value placed thereon for taxing purposes was the sum of $82,024.00, and a tax levied and assessed thereon in the sum of $3386.47. That the tax in the sum of $3220.78 paid on the 12th day of December, 1928, as before stated, was the first, and the only, assessment and tax that has been paid thereon.

From such offers of proof it will be noted that the only protest claimed to have been made by the agents, attorneys and employees of appellees was against the listing for taxation or assessment and the taxing of the Brown indenture to appellees, and that no protest was made relative to like instruments, or that the County Commissioners or taxing authorities ever acted upon or were influenced by such protest, or that such agents, attorneys or employees ever said anything or made any statement at any time relative to what the Brown indenture was, or that Brown ever paid any tax on his indenture or the lands described therein, or that the servient owners of like indentures ever paid any tax thereon or upon the property described therein, or that that protest ever imposed the burden of taxation on any person or persons or at all, or that such agents, attorneys and employees ever requested the Attorney General of Idaho to notify the taxing authorities of Kootenai County, Idaho, that they could not assess and tax the appellees under the Brown indenture or under like indentures, or that such Attorney General ever acted upon any

request ever made to him by any of such agents, attorneys and employees, or that any date was mentioned when such protest or request was made, or that appellees ever did anything to impose any tax upon any one whatever, or ever protested against any tax that had been assessed and levied or ever failed to pay any tax assessed and levied against them or any of their properties.

In addition to being inadmissible on account of their incompetency and immateriality such offers of proof were barred by the statute of frauds, and the subject matter thereof was not an issue in this action and was not mentioned in the amended complaint.

Notwithstanding they constituted no part of such offers of proof and were never submitted to the District Court, statements were inserted in appellant's brief as will appear from pages 38 to 42 thereof inclusive, as parts of such offers of proof, to-wit:

In speaking about the Brown indenture it is stated: "that appellees, through their agents, attorneys and employees, * * * protested against any interest in the properties therein described being assessed and taxed against appellees, and also appeared before the Attorney General of the State of Idaho, and at a special conference with him requested that he notify the taxing authorities of said County that they could not assess and tax appellees under such instruments."

"And also after the commencement of this action and some twelve or fifteen other actions, involving the same question, and like instruments, that some supposed interest of appellees was listed for taxation and thereupon a tax was levied and assessed upon said instruments, or ap-

pellees' interest in the lands described therein, in the sum of $3,220.78, * * * and said tax is the only tax that has been paid by appellees upon said instrument or the lands covered thereby."

There is nothing in the offers of proof as to such a protest or request or the assessment and taxation of a supposed interest of appellees or as to the only tax paid by the appellees on the lands covered by the Brown indenture.

In speaking about the appellees, it is stated: "they were acting in bad faith toward the servient owners, when, by their protests, they let the burden of taxation, for nearly twenty years, fall upon the servient owners, instead of paying their share of the taxes that were justly due for them to pay." There is absolutely nothing in the offers of proof relative to appellees, by their protests or otherwise, letting the burden of taxation, for twenty years or any time, fall upon servient owners, or upon any one, or that they ever failed to pay their share of taxes or any taxes that were justly due or due at all for them to pay.

Is it fair to insert such a statement into appellant's brief for which there is no support in the record?

It is further stated: "If they were acting in good faith they must have considered that the instruments were not easements and did not convey any interest in the lands described therein."

What possible excuse can be offered for that statement when it is remembered that nowhere in the offers of proof or in the record does it appear that the appellees ever acted otherwise than "in good faith," or that they ever considered the Brown indenture and similar indentures, which

were executed to them, were not easements or that they did not convey to them an interest in the lands described therein?

Based upon their assumption, and not upon the record, that the appellees did not believe that the Brown indenture and like indentures were easements and that they did not convey an interest in the lands therein described, the authors of appellant's brief stated therein as follows: "we must and do assert that they were acting in bad faith, for the only purpose of shirking taxation responsibility, and having the land owners pay a tax which appellees then must have known belonged to them to pay, and by which, as the record shows, they required the land owners, during a period of approximately twenty years, to pay many thousands of dollars of taxes, which legally and justly, should have been assumed by appellees and the land owners relieved of that burden."

Such an attack cannot be excused on any ground when it is remembered that there is nothing in the record to support it, nothing in the record showing that the appellees ever acted in bad faith, or for the purpose of shirking taxation responsibility, or of having land owners or any one pay any tax which appellees knew belonged to them, or which belonged to them at all, to pay, or ever required land owners or any one, during a period of twenty years or during any time, to pay many thousands of dollars or any sum for taxes, or to pay anything else, which legally or justly or at all should have been assumed by appellees, or any land owners relieved of the burden thereof, or that any of such land owners ever paid any tax on anything or at all.

Not believing that such attack and similar attacks appearing in appellant's brief will be considered by this Honorable Court in a review of the record in this action, no further reference will be made in this brief to such attacks, than to invite to the attention of this Court the fact that it was deliberaely stated that such attacks and the subject matter thereof, for which there is no support in the offers of proof or in the record, are offered as testimony, as will appear on page 41 of appellant's brief: "This testimony is offered for the purpose of aiding in the interpretation of the instrument, Exhibit A."

Upon what system of appellate procedure or rule of law do the authors of appellant's brief offer to this Honorable Court their unsupported, unprovoked, inexcusable attacks upon these appellees as "testimony" for the reversal of the judgment of the District Court?

It is believed such conduct is unprecedented.

The repeated statement in appellant's brief that there is no dominant estate in the appellees and no servient estate in Brown described in the Brown indenture is contradicted by the plain and unambiguous language of such indenture, and no denial as to what it contains can change its language.

The text quoted in appellant's brief from section 94 on page 907 of 19 Corpus Juris in so far as applicable to any issue in this action is against the appellant. For instance, the following part of such text is against the contention of appellant as to what Brown did not do and as to what any agent, attorney or employee of appellees protested, to-wit:

"The determination of the extent and nature of an

easement granted or reserved in express terms by deed depends upon a proper construction of the language of the instrument, from an examination of all the material parts thereof, and without consideration of extraneous circumstances, where the language is unambiguous."

That part of such text as refers to the conduct or admissions of the parties to an instrument, the meaning of which is doubtful, is not in point. There is no doubt as to the meaning of the Brown indenture, its language is clear and unambiguous. The following was the view of Judge Cavanah as to the meaning and language of the Brown indenture as expressed by him in his reply to a suggestion of Mr. Morrill that it did not cover the damages alleged in this action, to-wit: "I confess I cannot understand the English language if it doesn't. No, it is very clear." (R. p. 59.)

Furthermore, there is nothing in the offers of proof as to any conduct or admissions on the part of Brown in respect to his indenture and nothing in the entire record as to any admissions on the part of the appellees, while it does appear in the amended complaint that they have conducted their mining and milling operations and used the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in such operations and for the transportation and carrying away of the tailings, waste material and debris resulting from such operations at all times in the same manner as referred to in the Brown indenture and as complained of in the amended complaint of the appellant.

However, the law and decisions supporting the claim of appellees that all statements or protests of Brown and the

appellees and their agents, attorneys and employees concerning the Brown indenture prior to or at the time of its execution are inadmissible, and that all of their statements or protests relative to such indenture subsequent to its execution are both inadmissible and barred by the statute of frauds of Idaho, will be discussed in the division of this brief where the objections of the appellees to the offers of proof of the appellant are reviewed in their regular order.

BROWN INDENTURE NOT AN EASEMENT IN GROSS OR A LICENSE

The Brown indenture, being appurtenant to the mines and mills of the appellees and to their operations thereof which include the use of the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in such operations and in the transportation and carrying away of the tailings, waste material and debris produced by those operations, and being attached and belonging to the dominant estate of appellees, and creating an interest and estate in appellees in the property of Brown, and making the Brown property servient to the mines, mills, operations and uses of the appellees, all to be had and held by appellees and their successors and assigns forever, is an easement and is inheritable, and is not an easement in gross or a license which merely gives a permission, which permission is not inheritable.

Every right, every privilege, every use granted and conveyed by the Brown indenture, together with all appurtenances, such indenture states these appellees and their successors and assigns shall have and hold forever. Surely, that is not language creating a mere easement in

gross or a license that Brown or this appellant can revoke at pleasure.

Upon this contention there is submitted the following illuminating and convincing language of the Court in Eastman v. Piper, 229 Pac. 1002, 1004:

> "Applying these principles as aids to the construction of the instrument in question, we conclude that the right or privilege created thereby was something more than a mere personal, revocable license, that it was, in short, an easement. The right which it passed to Moffit, his heirs, or assigns was a right created by grant. The instrument expressly 'grants' to Moffit, his heirs, or assigns, the privilege of a roadway. And though a license may be created by deed, where the intention to create no more than a personal, revocable permission is clearly manifest, the fact that the instrument here under consideration expressly 'grants' the privilege of a roadway is of some significance in determining the nature of that privilege. See Walterman v. Norwalk, 145 Wis. 663, 130 N. W. 479, Ann. Cas. 1912A, 1176, where the court says: "* * * The use in the instrument of the words, 'remise, release, and forever discharge,' etc., indicates pretty clearly an intention to give something more than a mere license; to grant an easement in the land." Another suggestive feature of the instrument, and one which we deem especially pregnant with significance, is that it grants the roadway privilege to Moffit and to 'his heirs or assigns.' As we have pointed out, a license, being a mere personal privilege, is never extended to the heirs or assigns of the licensee. Indeed, any attempt by the licensee to assign the license ordinarily destroys and terminates it. Bates v. Duncan, 64 Ark. 339, 42 S. W. 410, 62 Am. St. Rep. 190; United States Coal, etc., Co. v. Harrison, 71 W. Va. 217, 76

S. E. 346, 47 L. R. A. (N. S.) 870. The grant of the privilege of a roadway to Moffit, 'his heirs, or assigns' was an express recognition that the privilege was to be inheritable and assignable But as the qualities of inheritability and assignability are inconsistent with a license, we must conclude that something more than a license was intended to be granted; that it was intended to create an inheritable interest in a servient estate---in short, an easement."

Hearing in that case denied by Supreme Court of California.

There not being anything in the text or decisions cited in appellant's brief to support a claim or holding that the Brown indenture is not an easement, it is not thought necessary to make an extended analysis of them.

Since the Brown indenture grants and conveys rights and privileges which are connected with the property of Brown and to which he makes his property servient, and on account of the exercise of such rights and privileges he claims his property has been depreciated in value and damaged, the language quoted in appellant's brief from Tinicum Fishing Co. v. Carter, 100 Am. Dec. 597, has no application to the Brown easement and is not in point. Nor are the facts stated in that case in any way similar to the allegations in the amended complaint or to the matters and things stated and the properties described in the Brown easement.

Nor is the case of Lawton v. Herrick, 67 Atlantic 986, cited in appellant's brief, and which involved riparian rights, in point. The appellant does not make any claim in this action as a riparian owner.

An upper riparian owner has the undoubted right to

contract with the lower riparian owner for the privilege to pollute the watercourse with respect to which they claim their riparian rights. The following will be found in 30 Am. and Eng. Ency. of Law (2d Ed.) page 384:

> "Contract Rights.---An upper riparian owner may by contract with the lower riparian owner acquire, as against him, the right to pollute the watercourse."

The case of Yazoo & M. V. R. Co. v. Smith, 43 So. 611, cited in appellant's brief, is not in point and the terms and provisions of the deed under consideration in that case were not in any manner or degree similar to the terms, provisions and covenants of the Brown indenture. Nor were the allegations in that case similar to the allegations in the amended complaint in this action. Therein the grade of the railroad track over which the defendant operated its trains had been raised to a higher level subsequent to the execution of the deed than existed at the time when such deed was executed, which grade elevation caused the damages complained of. In this action the acts, operations and uses on the part of the appellees alleged in the amended complaint are the same as the acts, operations and uses complained of by Brown, to-wit: their operations of their mines and mills and their use of the waters, mentioned both in the indenture and in the amended complaint, in such operations and in the transportation and carrying away of the tailings, waste material and debris resulting from such operations.

In his indenture Brown specifically refers to the future operations of the appellees and their future use of such waters therein, specifically claims that the value of his property will be reduced and such property damaged by

those future operations and uses, and specifically grants and conveys to the appellees and their successors and assigns forever the right and privilege of conducting such future operations and the future use of such waters therein, and specifically releases appellees from all future damages and claims for future damages on account of and resulting from such future operations and such future uses.

Without limitation, reservation or exception Brown in his indenture anticipated and provided against every act, operation and use by the appellees and every consequence, injury and damage resulting therefrom alleged in the amended complaint.

Nowhere in this record does it appear that the operations of the appellees have been different since the execution of the Brown indenture from their operations prior to and at the time of its execution.

However, it does not lie in the mouth of the appellant to criticise Brown or his indenture. Brown owned the lands mentioned in his indenture and had the right to make any disposal of them or to encumber them as he saw fit. The appellant knew at the time he claims to have purchased such lands that the same were subject to and encumbered with the rights, privileges and covenants of the Brown indenture and he cannot now and never could have complained as to what Brown did with relation to such lands and the execution of his indenture. Brown is not here complaining and it does not appear in the record that he ever complained as to his indenture or as to any of its terms, provisions and covenants, and the appellant and the property he claims are bound by the Brown easement.

As to the supposititious case mentioned in appellant's brief, of appellees being engaged in the lumbering business and in the operation thereof using the waters of the Coeur d'Alene River and its tributaries for floating logs and transporting and carrying away sawdust and debris resulting from such operations, and as to whether they would be liable for damages caused by the waters of such river and tributaries in carrying such sawdust and debris down to and upon the lands of Brown, the conclusive answer is that they would not be had Brown given to them a similar indenture to carry on their lumbering business, to use the waters of such river and tributaries therein, and therein made his lands subject to such operations and uses, as he gave to the appellees in this action.

As to the further supposititious case mentioned in appellant's brief of Brown designating but forty acres of his land described in his indenture, the answer is he made no such designation, but did make all of such land servient to all of the acts, operations and uses of the appellees referred to in the amended complaint, and forever released appellees and their successors and assigns from all of the consequences, injuries and damages resulting from such operations and uses as are alleged in such amended complaint.

The statement in appellant's brief that the interpretation of the Brown indenture or one similar to it by Judge Dietrich in the Polak case was not an issue in that case is not correct, as will appear later on in this brief where reference is made to the interpretation thereof by Judge Dietrich as "releases and easements."

Nor is it correct as stated in appellant's brief that Judge

Gilbert in rendering the opinion of this Court in the Polak case referred to such instrument as a "release of claims for damages to lands subject to overflow,".

His reference to such indentures or instruments, as to what lands they covered, and as to release they gave to the appellees is as follows: "and their joint acquisition of written agreements from property owners for release of claims for damages to lands subject to overflow."

The interpretation by Judge Dietrich of the Brown indenture and similar indentures as "releases and easements," and the interpretation of the same by Judge Gilbert, as "release of claims for damages to lands subject to overflow," make the lands mentioned in such indentures servient to the rights, privileges, operations and uses of the appellees described in such indentures and the acts, operations and uses of the appellees complained of in this action, and release appellees from all claims for damages alleged in amended complaint in this action, and sustain the interpretation by Judge Cavanah of the Brown indenture, and support and uphold the judgment of dismissal by the District Court, and make unnecessary any further discussion or citation of authorities in this brief. But in justice to Judge Cavanah, appellees feel it to be their duty to review the record and to submit the law and decisions applicable thereto which support the District Court in its interpretation of the Brown indenture and in the rendition of the judgment of dismissal in this action.

CLAIM OF APPELLANT NOT AN ORIGINAL CLAIM

The claim asserted by the appellant in this action is neither original nor of recent origin. On the contrary, it is

just such a claim as was asserted in McCarthy v. Bunker Hill & Sullivan Mining & Concentrating Company, 164 Fed. 927, for Joseph M. Brown, the predecessor in interest of the appellant, and concerning the identical lands involved in this action. In truth, the material allegations in the amended complaint herein were borrowed from the bill of complaint in the McCarthy suit.

Nor is the claim asserted by the appellant of a different nature from the claim stated by Brown in his easement and release pleaded in the answers of the appellees, and which the District Court held to be a complete defense against the claim by the appellant for damages in this action.

If the lands involved in this action were damaged and destroyed by the acts, conduct and operations on the part of the appellees, Bunker Hill and Sullivan Mining and Concentrating Company, Federal Mining and Smelting Company and Hecla Mining Company, as alleged in the bill in the McCarthy suit, prior to the commencement of such suit on November 23, 1904, in the Circuit Court of the United States for the District of Idaho, Northern Division, such lands could not have been damaged and destroyed a second time by the same acts, conduct and operations of these appellees, as alleged in the amended complaint in this action, which action was commenced in the District Court of the United States for the District of Idaho, Northern Division, February 7, 1928.

Respecting the claim for damages in the McCarthy suit, 147 Fed. 981, District Judge Beatty had this to say:

" "The complainants allege that about the year 1890

they entered into possession of the lands in question, which are low flat lands lying along the Coeur d'Alene River, and that the defendants through certain mining operations have rendered impure the water of said river, which, when it overflows their lands, poisons and destroys vegetation, as well as animal life, and ask an order restraining defendants from further depositing any mining debris into said river. Among the allegations of the complaint are that when they took possession of their lands the channel of said river was navigable for large boats, which was of great advantage in controlling the freight rates; also that the river was valuable for floating logs and timber to market; that from defendants' mining operations a large amount of material, including lead and other poisonous matter, is cast into said river, which by its overflow deposits upon said lands these poisoned materials, causing destruction of vegetation and the poisoning of the grass and hay with which it comes in contact; that such grass and hay, when eaten by domestic animals, cause their death, and the same result follows from their drinking of said waters; that these deposits have filled the channel of said river 'to such an extent that it is no longer well defined, and its banks rise but little above the stream at low water, so that any slight rise * * * causes it to overflow its banks;' that the channel in places has been filled more than 60 feet, so that places once navigable for large boats cannot now be navigated by even small boats; and that much waste and debris have been deposited upon said lands, but that noticeable evidence of these deposits and alleged injuries complained of has been chiefly since the year 1900.' "

Referring to the allegations of the bill and his examination of the lands involved, Judge Beatty said:

"Had not the affidavits convinced me that these allegations were highly colored, the personal examination made would remove all doubt that some of them are absolutely untrue. After the most careful observation, no justification appeared for the charge that the channel of the river had been so filled with mining deposits or debris that it is no longer well defined, or that it has been filled 'more than 60 feet,' or that its navigation has been obstructed, or that large deposits of such debris have been made upon the lands."

As to the first place at which he stopped, Judge Beatty said:

"The first place we stopped was at Bacon's ranch, where there was no evidence whatever of any mining deposits."

It may be interesting to note that the Bacon ranch was and is located down the river, immediately west of and adjacent to the lands claimed by the appellant.

In further reference to the allegations of the bill, Judge Beatty said:

"There was no evidence whatever to justify the assertion that the river had been greatly filled or that navigation had been impeded. The only impediment was the floating logs on their way to the mills, and the river was deep enough to float a battleship, nor is this at the high-water stage. The banks everywhere were from 4 to 6 feet above the water. A few soundings taken showed a depth of 30 feet, and those taken some time ago by Sanborn, a steamboat captain, showed as much as 40 feet in places, and he said the river is now as deep as it was in 1884, and as it was during the many subsequent years he navigated it. The wild assertions of complainants are without justification. They cannot

shelter themselves behind the flimsy veil that they believed them, because so told. A man must have some reason for his belief before asserting it as a truth. It seems by some to be considered admissible practice in litigation to assert anything, regardless of the truth, that will constitute a non-demurrable case. It is a duty that counsel owe to the courts to see that their clients present to them only the truth. Courts will endeavor to see that no man shall succeed through misrepresentation. It must be concluded either that these complainants intended to deceive the court, or were themselves deceived by their own culpable negligence."

In the exhaustive review of the bill of complaint in the McCarthy suit, supra, in the opinion of this Honorable Court, written by Circuit Judge Ross, it appears that Joseph M. Brown was an associate of the complainants in the association of individuals referred to in the bill and the owner of lands alleged to have been damaged and injured by the acts, conduct and operations of these appellees referred to in such bill.

Judge Ross in his opinion in the McCarthy suit, supra, characterized the record therein in the following language:

"It is very evident from the record that the exaggerations and misstatements of matters of fact is very gross." (164 Fed. 939.)

ALLEGED ACTS, CONDUCT AND OPERATIONS OF APPELLEES

The acts, conduct and operations of the appellees complained of are set forth in the following allegations, found in the amended complaint:

"that for many years the defendants have from their

said properties, mined and extracted immense quantities of lead, zinc, copper, silver, and other metals, that in order to separate said minerals from the base rock, and earth in which they are found, and for the purpose of said treatment, the defendants have built, maintained, and operated, continuously, mills and concentrators, and in such operations the defendants have run through said mills and concentrators, daily many thousands of tons of said ores, the exact amount, this plaintiff has no means of knowing, and after said minerals were thus extracted these defendants dumped and cast said refuse, consisting of rock, earth, slimes, tailings, debris, and other poisonous substances into the said Coeur d'Alene River and its tributaries, and upon their banks, which deposits by the natural force and action of the waters of said streams, washed and carried into the Coeur d'Alene River, and down said River, to and during flood times, upon plaintiff's said land;". (R. p. 20.)

It is alleged in paragraph IV of the amended complaint as follows:

"that the high waters of the Coeur d'Alene River, and its tributaries, at reoccurring periods, annually, and frequently semi-annually and some years oftener, overflow the banks of said river, and flood and spread-over and upon this plaintiff's land and adjoining and adjacent land, in said valley, to a depth of from two to six feet, verying with the rise of said valley, to a depth of from two to six feet, verying with the rise of said river, and high water slowly receeding therefrom, except in low places or depression, where said waters do not flow away at all, but remain in stagnant pools, which gradually sink and percolate into the soil, that poisonous mineral ingredients with which said waters are impregnated as hereinafter setforth, are deposited

and forms sediement upon, and overflows plaintiffs said lands, and produces a destructive effect as hereinafter setforth;". (R. p. 20.)

Nowhere does it appear in the above quoted allegations of the amended complaint during what years the "reoccurring periods," referred to therein, occurred, or during what years the "poisonous mineral ingredients" were deposited on the lands. But from said allegations it appears that such deposited "poisonous mineral ingredients" "produces a destructive effect as hereinafter setforth;".

Thereafter follow the allegations as to the "destructive effect" of the deposit on the lands of such "poisonous mineral ingredients" and when they were deposited.

From the following allegations, appearing in the amended complaint, no other conclusion can be reached than that the appellant based his cause of action against the appellees upon their operations prior to "the excessive overflow in the winter of 1917 and January 1918," and upon such "excessive overflow", and not upon any operations subsequent to the "excessive overflow", or upon any other overflow, as will appear in such allegations, as follows:

"V."

"Plaintiff further alleges that the poisonous mineral matter and debris, so cast and deposited on said lands as aforesaid, has so weakened and impaired said land, that the crops growing thereon since the excessive overflow in the winter of 1917 and January 1918, are greatly inferior to what they were before said lands were overflowed as herein before described, by said polluted waters as aforesaid; that in the year 1917 and

prior thereto, and before said low or meadow land were covered to an excessive degree by said tailings, waste, and poisonous mineral substances and debris, as hereinbefore alleged, plaintiff produced on said low lands on an average of three tons of timothy hay per acre, all of an excellent quality, and readily saleable on the ranch or at the nearest market, for the best and highest prices then obtainable; that after the high waters of December 1917, and January 1918, the plaintiff received and produced less than one ton of hay per acre on the same lands, all of an inferior quality, all on account of the negligent, careless, willful, and unlawful operations of the said defendants said mines, mills and concentrators, as hereinbefore alleged; that the conditions of said low lands are such now, that even without the over flow of said polluted waters, only crops of an inferior quality can be produced thereon for an indefinite time, and further overflowing will tend to further destroy the producing qualities of the soil; that for the last four years, plaintiffs said land has produced less (1/4) one-quarter of a ton of hay annually per acre." (R. p. 24.)

"VIII."

"That prior to said injury to said low lands by reason of the overflow of said polluted waters, and the deposit thereon of said mining debris, said low lands were reasonably worth the sum of $125.00 per acre, and after said injuries said lands were worth not to exceed $10.00 per acre,". (R. p. 29.)

"IX."

"That by reason of the overflow of said lands by the said polluted waters and the deposits of said mining debris, on and over said low lands, on account thereof the crops were damaged in the sum of at least $1500.00 per year, or a total damage to said crops for the years of

1924, 1925, 1926 and 1927, in the sum of $6000.00 with interest at the rate of 7% per annum, from April 1st, 1924 to March 1st, 1928." (R. p. 30.)

Thus it will be seen that appellant again and again alleged that it was one overflow, to-wit: "the excessive overflow in the winter of 1917 and January 1918," that injured the low lands, and that as a consequence of such injury the crop of hay was reduced from three tons per acre to less than one ton per acre.

It being specifically alleged in paragraph V of the amended complaint that the time of the deposit was "the excessive overflow in the winter of 1917 and January 1918," and that the "destructive effect" was that the lands were by such "excessive overflow" "so weakened and impaired" that while they produced "three tons of timothy hay per acre," in the year 1917 and prior to the "excessive overflow," "that after the high waters of December 1917, and January 1918," the same lands "produced less than one ton of hay per acre.", it is impossible to form any other conclusion: Than that the overflow the appellant avers deposited debris and poisonous material on the lands claimed by him, was "the excessive overflow"; than that the alleged injury to the lands was the result of such deposit at the time of "the excessive overflow," and than that whatever damage, resulting from the failure of the lands to produce less than one ton of timothy hay per acre, was the consequence of the injury to the lands caused by "the excessive overflow in the winter of 1917 and January 1918."

It is unhesitatingly asserted that there is no allegation in the amended complaint:

(a) That any of the lands involved were overflowed during any year subsequent to the month of January, 1918, or that any of such lands were overflowed during any of the four years prior to the commencement of this action.

(b) That any of the lands were injured by any overflow other than "the excessive overflow in the winter of 1917 and January 1918," or that any of the lands were injured subsequent to the month of January, 1918.

(c) That any of the lands were made non-productive by any overflow other than the "excessive overflow," or that any of the lands were less productive in hay, or any other crop, as a result of any injury to the lands than the alleged injury resulting from the "excessive overflow."

By positive averments the appellant has limited the impairment of the productivity of the lands claimed by him, and the decrease in crop growth thereon to an injury to the lands caused by the "excessive overflow in the winter of 1917 and January 1918,".

Any cause of action the appellant may have had on account of such injury accrued in January, 1918, and the failure of crop production was merely a consequence of such injury and not the cause of action.

The law upon this subject is stated in Section 179 of Wood on Limitations, as follows:

> "Sec. 179. Negligence.---In actions from injuries resulting from the negligence or unskillfulness of another, the statute attaches and begins to run from the time when the injury was first inflicted, and not from the time when the full extent of the damages sustained has been ascertained."

The Circuit Court of Appeals in Aachen & Munich Fire Ins. Co. v. Morton, 156 Fed. 654, held that the statute of limitations begins to run from the time a right of action accrues for a breach of duty or contract or for a wrong, without regard to the time when actual damage results. Circuit Judge Lurton, who afterwards became a Justice of the Supreme Court, in the Court's opinion, said:

> "If an act occur, whether it be a breach of contract or duty which one owes another or the happening of a wrong, whether willful or negligent, by which one sustains an injury, however slight, for which the law gives a remedy, that starts the statute. That nominal damages would be recoverable for the breach or for the wrong is enough. The fact that the actual or substantial damages were not discovered or did not occur until later is of no consequence. The act itself, which is the ground of action, cannot be legally separated from its consequences. Were this so, successive actions might be brought in many cases of contract and tort as the damages develop, although all the consequential injuries had one common root in the single original breach or wrong. This would in effect nullify the statute."

THE INDENTURE OF JOSEPH M. BROWN IS AN EASEMENT AND RELEASE AND DISCHARGES THE APPELLEES FROM THE CLAIM OF THE APPELLANT

To protect themselves from a repetition of litigation which received the disapprobation of both Judge Beatty and Judge Ross, and from such litigation as this action, these appellees paid for the easement and release of Joseph M. Brown, dated the 17th day of October, A. D.

1910, pleaded in and a copy thereof annexed to their answer, and for similar easements and releases from almost all of the land owners in the valley of the Coeur d'Alene River, who asserted claims similar to the claim of Brown appearing in his easement and release.

That Brown's claim in his easement and release was a repetition of his claim in the McCarthy suit, and is a like claim to that asserted in this action, appears from such easement and release, which is as follows:

EXHIBIT "A".

THIS INDENTURE made the 17th day of October, A. D. 1910, between JOSEPH M. BROWN a widower of the town of Dudley, County of Kootenai, State of Idaho, the party of the first part, and Bunker Hill and Sullivan Mining and Concentrating Company, a corporation organized under the laws of the State of Oregon, Federal Mining and Smelting Company, a corporation organized under the laws of the State of Delaware, Hecla Mining Company, a corporation organized under the laws of the State of Washington, The Gold Hunter Mining and Smelting Company, a corporation organized under the laws of the State of Minnesota, Peter Larson and Thomas L. Greenough partners doing business under the firm name of Larson & Greenough, the estate of Peter Larson, Deceased, Thomas L. Greenough, and Harry L. Day, Eugene R. Day, Jerome J. Day, Eleanor B. Boyce, Sylvester Markwell, Damian Cardoner, Charles H. Reeves, L. W. Hutton, August Paulsen, Frank M. Rothrock, Charles A. Markwell and Frank P. Markwell partners doing business under the firm name of Hercules Mining Company, parties of the second part,

WITNESSETH:

WHEREAS, the said party of the first part is the owner of and in the possession of the following described property situate, lying and being in the County of Kootenai, State of Idaho, to-wit: N. W. Quarter of the S. E. Quarter, the S. W. Quarter of the N. E. Quarter and the Lot Number (2) Two of Section (2) Two in Township (48) Forty Eight. North of Range One (1) West of the Boise Meridian in Idaho,

AND WHEREAS, the said party of the first part claims that by the depreciation in the value of said property and the loss of crops, and in the disease, sickness, loss and death of certain domestic animals including horses and cattle, he has been in the past and will be in the future damaged by reason of the past and future mining and milling operations in the Counties of Shoshone and Kootenai, State of Idaho, of the said parties of the second part and the use of the waters of the Coeur d'Alene river and the South Fork of the Coeur d'Alene river and its tributaries in such mining and milling operations and in the dumping of the tailings, waste material and debris from such mining and milling operations into, and the transportation and carrying away of the same by the waters of the said Coeur d'Alene river, the South Fork of the Coeur d'Alene River and its tributaries:

NOW THEREFORE, in consideration of the sum of THREE HUNDRED TWENTY FIVE AND NO-100 Dollars, lawful money of the United States of America, to the said party of the first part in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, and which payment is hereby acknowledged in full payment and satisfaction of all damages to the said party of the first part including all damages to crops, and for the loss of crops and by rea-

son of the sickness, disease, loss and death of domestic animals, horses and cattle and to said property and each and every part thereof which said party of the first part may have sustained in the past and which he may sustain in the future by reason of the said mining and milling operations of the said parties of the second part and the said use of the said waters of the Coeur d'Alene river, the South Fork of the Coeur d'Alene river and its tributaries, in said mining and milling operations and as a dumping ground for the tailings, waste material and debris resulting from such mining and milling operations and in the transportation and carrying away of the tailings, waste material and debris from such operations in the said counties of Shoshone and Kootenai, State of Idaho:

The said party of the first part does by these presents grant, bargain, sell, convey, and confirm unto the said parties of the second part and to their successors, heirs, executors, administrators and assigns forever, the right and privilege to carry on and continue in the said counties of Shoshone and Kootenai any and all mining and milling operations in which they or any of them may engage in said counties or either of them, and the right and privilege of dumping any tailings, waste material or debris that may result from such mining and milling operations into the said Coeur d'Alene river, the South Fork of the Coeur d'Alene river and its tributaries or along the banks thereof, and of having such tailings, waste material and debris transported and carried away by the said waters of the Coeur d'Alene river, the South Fork of the Coeur d'Alene river and its tributaries; and the said property of the said party of the first part and each and every part thereof is hereby made subject to and charged with the said mining and milling operations of the said parties of the

second part in the past, and the said use of the said waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene river and its tributaries in said operations, and in the said transportation and carrying away of said tailings, waste material and debris by said waters, and also with all the mining and milling operations in the future of the said parties of the second part and their successors, heirs, executors, administrators and assigns, and the said privilege of dumping the tailings, waste material and debris that may result from such mining and milling operations into the said Coeur d'Alene river, the South Fork of the Coeur d'Alene river and its tributaries and along the banks thereof, and the use of the waters thereof in such mining and milling operations, and for the transportation and carrying away of all said tailings, waste material and debris that may result from all such mining and milling operations both in the said county of Shoshone and the said county of Kootenai, State of Idaho; and in further consideration of the payment of said sum, the said party of the first part, does hereby release said parties of the second part and their successors, heirs, executors, administrators and assigns from all damages and claim of damages in the future on account of any injury or damage to said property and every part there of and the loss of and damage to any and all crops upon the above described property and the sickness, disease, loss and death of any and all domestic animals thereon, which may be caused by such mining and milling operations of the said parties of the second part and their successors, heirs, executors, administrators and assigns, and the dumping of such tailings, waste material and debris as may result from said mining and milling operations into the said Coeur d'Alene river, the South Fork of the Coeur d'Alene

river and its tributaries and along the banks thereof, and the use of the said waters of the Coeur d'Alene river, the South Fork of the Coeur d'Alene river and its tributaries in such mining and milling operations and for the transportation and carrying away of all such tailings, waste material and debris that may result therefrom in the said county of Shoshone and the said county of Kootenai, State of Idaho.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular, the said premises, together with the appurtenances, unto the said parties of the second part, their representatives, successors, heirs, executors, administrators and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal, the day and year first above written.

Signed, sealed and delivered
in the presence of:
W. B. HAGAR JOSEPH M. BROWN (SEAL)

STATE OF IDAHO, }
County of Kootenai, } ss.

On this 17th day of October, A. D. 1910, before me, W. B. HAGAR, a Notary Public in and for the said County, personally appeared JOSEPH M. BROWN known to me to be the person whose name is subscribed to the within instrument, and asknowledged to me that he executed the same.

IN WITNESS WHEREOF I have hereunto set my

hand and affixed my notarial seal the day and year in this certificate first above written.

(SEAL) W. B. HAGAR,
Notary Public

Endorsed:

STATE OF IDAHO, } ss.
County of Kootenai, }

Filed for record at the request of
R. M. WARK
on the 24th day of May, 1911 at 11:09 o'clock A. M. and recorded in Book 42 of Deeds on page 683.
D. E. DANBY
County Recorder. (R. p. 45.)

A reading of the amended complaint discloses, beyond any doubt, question or controversy, that there is asserted in this action a claim just like the claim asserted in the McCarthy suit, supra, on behalf of Joseph M. Brown for like injury to the same lands, and for a failure of crop production thereon, such as is alleged herein, also just such a claim as was asserted in Bunker Hill & Sullivan Mining & Concentrating Co. v. Polak, 7 Fed. (2d Series) 583.

Likewise, a reading of the above quoted indenture of Joseph M. Brown discloses, beyond any doubt, question or controversy, that it applies to and includes both the claim of Brown and the claim of appellant, and constitutes a complete defense against any recovery from appellees in this action.

The claim of appellant, like the claim of Brown and the claim of Polak, is founded upon the alleged mining and

milling operations of appellees, their use of the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in such mining and milling operations, their discharge of the tailings, waste material and debris, resulting from such mining and milling operations, into the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries and along their banks, and the transportation and carrying away of such tailings, waste material and debris by the natural force and action of the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries down said Coeur d'Alene River to and upon the lands claimed by the appellant.

All acts, uses and operations on the part of the appellees, complained of in the amended complaint, are specifically and in detail provided for and authorized in the Brown indenture, and therein and thereby appellant's alleged lands and crops have been made subject to and bound by all such acts, uses and operations, and all alleged damages resulting therefrom have been anticipated by the terms and the provisions of such indenture, and therein admitted to have been paid for by the appellees.

As set forth in the third paragraph of his indenture, Brown claimed that by the depreciation in the value of his lands, by the loss of crops, and in the disease, sickness, loss and death of his domestic animals, including horses and cattle, he had been in the past and would be in the future damaged by reason of the past and future mining and milling operations of the appellees in the counties of Shoshone and Kootenai, State of Idaho, by their use of the

waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in such mining and milling operations, by their dumping of the tailings, waste material and debris, resulting from such mining and milling operations, into, and by the transportation and carrying away of such tailings, waste material and debris by the waters of said Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries.

From such claim upon the part of Brown, no other conclusion can be reached than that the damages he complained of were caused by the overflow of his lands and property by the waters of the Coeur d'Alene River, which overflow carried and deposited thereon such tailings, waste material and debris.

Brown strengthened that conclusion by stating in his indenture that in consideration of the payment by the appellees of the sum of money mentioned therein he released them and their successors and assigns from all damages and claim of damages in the future on account of any injury or damage to his said property and every part thereof, on account of the loss of and damage to any and all crops upon said property, and on account of the sickness, disease, loss and death of any and all domestic animals on said property, which might be caused by the future mining and milling operations of the appellees and their successors and assigns, by their dumping of the tailings, waste material and debris, which are produced by their future mining and milling operations, into the said Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries and along their banks, and by

their use of the said waters of the said Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in such future mining and milling operations and for the transportation and carrying away of such tailings, waste material and debris as might result from such future mining and milling operations in the County of Shoshone and the County of Kootenai, State of Idaho.

Therefore, it is inexcusable to suggest or intimate that Brown sought money from appellees, or that they paid him, for the right and privilege of having the tailings, waste material and debris, produced in their mining and milling operations, merely transported and carried away by the waters of the Coeur d'Alene River confined and flowing within its banks.

Brown's lands were not situate in the waters or in the channel of the Coeur d'Alene River between its banks.

His crops were not grown in the waters or in the channel of the Coeur d'Alene River between its banks.

His domestic animals were not kept or fed or pastured in the channel of the Coeur d'Alene River between its banks.

It cannot under any fair or reasonable construction or interpretation be contended that Brown's indenture did not and does not grant and convey to these appellees the right and privilege of having all tailings, waste material and debris, produced by them in their mining and milling operations, deposited upon the lands and crops involved in this action by the waters of the Coeur d'Alene River while

transporting and carrying away such tailings, waste material and debris.

Every act with which the appellees were charged in the amended complaint and every consequence alleged to have resulted therefrom were authorized, provided for, sanctioned and permitted by the Brown indenture which specifically makes the lands and crops claimed by the appellant subject to all the alleged mining and milling operations of the appellees of whatever character they may be, to all the alleged use by them of the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in such mining and milling operations, to all the alleged use by them of such waters and of such rivers and tributaries for the alleged dumping therein of all tailings, waste material and debris produced by such mining and milling operations, to all the alleged use by them of all such waters for the transportation and carrying away of all such tailings, waste material and debris and to all the alleged depositing of such tailings, waste material and debris upon such lands and crops by the alleged overflowing thereof by the waters of the said Coeur d'Alene River.

Neither Brown nor the appellant could maintain an action against these appellees for such mining and milling operations, for such use of said waters therein, for such depositing of said tailings, waste material and debris into the waters of said rivers and tributaries and for transportation and carrying away of such tailings, waste material and debris by the waters of the Coeur d'Alene River flowing only in its channel between its banks, even though

the Brown indenture did not exist.

Such is the decision and holding of Judge Dietrich in Hill v. Empire State-Idaho Mining & Developing Co., 158 Fed. 881, wherein he used the following language:

> "Moreover, the damage for which recovery is sought is not the direct, but only the consequential, result of the defendant's acts. So far as appears, it had the right to erect and operate its reduction works, and, in casting into Canyon creek its waste material, it infringed upon no right of the plaintiffs. It was only by reason of the intervening agency of high water, the effect of which was uncertain and contingent, that the defendant's acts indirectly resulted in the injury to plaintiffs' land."
>
> * * * * *
>
> "Assuming that the defendant was negligent in casting into Canyon creek poisonous substances, and in filling the channel of the stream therewith, and in not taking proper precautions to impound such waste material and prevent it from being discharged upon plaintiffs' land, such negligence of itself did not constitute a right of action in favor of plaintiffs. Negligence alone does not create a right of action. There must be negligence and resulting damage, and until the waters overflowed the plaintiffs' land they could not have recovered even nominal damages."

That decision was rendered by Judge Dietrich January 24, 1908, two years, eight months and twenty-three days before Brown executed his indenture on the 17th day of October, 1910.

That decision was well known to these appellees and was doubtless known to Brown.

With their knowledge of that decision it is inconceivable

that appellees paid Brown for the execution of his indenture merely for permission to conduct their mining and milling operations, to use the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in such mining and milling operations, to dump the tailings, waste material and debris, produced by such mining and milling operations, into such rivers and tributaries and to have such tailings, waste material and debris transported and carried away by such waters of the Coeur d'Alene River as were confined to and flowed only in its channel between its banks.

With his knowledge of that decision it is equally inconceivable that Brown should claim compensation from appellees for damages for the transportation and carrying away of their tailings, waste material and debris by the waters of the Coeur d'Alene River which did not overflow his lands.

THE INDENTURE OF JOSEPH M. BROWN IS AN EASEMENT AND RELEASE AND A COVENANT RUNNING WITH THE LAND

This indenture of Joseph M. Brown was one of the indentures referred to in the amended complaint in the Polak case, supra, interpreted and construed in that case by District Judge Dietrich and by this Court.

In the amended complaint in the Polak case, in which these appellees and other mining companies were made defendants, it was alleged that such defendants and other mine owners, during the last ten or fifteen years, acquired by purchase, evidenced by written agreements running to them and other mine owners, from various property

owners owning lowlands along, adjoining and adjacent to the Coeur d'Alene River, the right and privilege to use the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and their tributaries in their mining and milling operations, for the dumping and depositing of tailings, debris, detritus, refuse and waste material, produced by such mining and milling operations into, and for the transportation and carrying away of the same by the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and their tributaries, and that they acquired by such written agreements such rights and privileges in and to about ninety per cent of all the lands subject to overflow along the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and their tributaries.

There not having been any such agreement as to the Polak lands, the defendants in the Polak case moved to strike out such allegations as being irrelevant and redundant matter inserted in the amended complaint in that case, which motion was overruled by the District Court, presided over by District Judge Dietrich. Such written agreements included the Brown indenture.

In passing upon the motion to strike out Judge Dietrich was called upon to interpret and construe and did interpret and construe the terms, provisions and covenants of such written agreements, which included the Brown indenture, and which were alike in terms, provisions and covenants, differing only as to parties of the first part, lands and amounts paid, but including among the parties of the second part therein these appellees. Thus it will be seen

the Brown indenture was made an issue in the Polak case.

Many of such written agreements were received in evidence at the trial over the objections of the defendants which included, among other grounds, that they were incompetent, immaterial and not responsive to the issues in that case, and again District Judge Dietrich was called upon to interpret and construe the terms, provisions and covenants of such written agreements, and in order to permit them to be admitted in evidence and used as evidence in the Polak case he did interpret and construe such written agreements and in doing so used the following language in his decision in that case in referring to the acts, conduct and operations of the defendants therein complained of, and to the competency and application of such written agreements to the issues in that case, to-wit:

> "and, as shown by several instruments in evidence, they acted together in securing from farmers in the valley, releases and easements as against just such a claim as the plaintiff is here asserting."

The Brown indenture having been held by District Judge Dietrich to be a "release and easement", we pass to the decision of the Supreme Court of Idaho in Howes v. Barmon, 11 Idaho 64, where on page 69 that Court held that an easement is an interest or estate in real property, in the following language:

> "On the other hand, an easement is an interest or estate in real property, and is subject to the operation of the statute of frauds."

From the decision of the Supreme Court of Idaho, holding that an easement is an estate in real property, we pass to Section 5413 of Idaho Compiled Statutes 1919 to show

that the Brown indenture, being an easement and constituting an estate in real property, is an instrument that could be recorded in the office of the County Recorder of the County of Kootenai, State of Idaho.

That section is as follows:

> "Sec. 5413 (3149) What may be recorded. Any instrument or judgment affecting the title to or possession of real property may be recorded under this chapter. (R. S. Sec. 2990.)"

It was admitted at the trial that the Brown indenture was recorded in the office of the County Recorder of the County of Kootenai, State of Idaho, on the 24th day of May, 1911, in Book 42 of Deeds, beginning on page 683 thereof, records of said Recorder's office. (R. p. 95.)

APPELLANT HAD NOTICE AND KNOWLEDGE OF THE BROWN INDENTURE AND OF ITS TERMS, PROVISIONS AND COVENANTS FROM DATE IT WAS RECORDED, AND IT IS CONCLUSIVE AGAINST HIM

The Brown indenture, conveying an estate in real property, is a conveyance under Section 5373 of Idaho Compiled Statutes 1919, which is as follows:

> "Sec. 5373. (3105) Conveyance: How made. A conveyance of an estate in real property may be made by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing. (R. S. Sec. 2920.)"

The appellant had notice and knowledge of the Brown indenture and of its terms, provisions and covenants

from the time it was recorded on the 24th day of May, 1911, by virtue of the provisions of Section 5423 of Idaho Compiled Statutes 1919, which section is as follows:

> "Sec. 5423. (3159) Record as notice. Every conveyance of real property acknowledged or proved, and certified, and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees. (R. S. Sec. 3000.)"

In passing upon this proposition of notice and knowledge on the part of the appellant, Judge Cavanah in his opinion had this to say:

> "This written instrument having been recorded in the office of the County Recorder of Kootenai County on May 24th, 1911, the plaintiff had knowledge of its existence and terms on that date and when he became the owner of the lands in question some five years before the commencement of this action. There could be no concealment of its existence as the public records of the county are open to all and is such evidence as operates as notice to the plaintiff, a subsequent purchaser of the land. Wood v. Carpenter 101 U. S. 1291; Noyes v. Hall, 97 U. S. 34, 38." (R. p. 68.)

In Wood v. Carpenter, 101 U. S. 135, the Supreme Court of the United States had under consideration certain confessed judgments which had been recorded, also certain conveyances of real property which had been recorded in proper offices. Concerning the confession of such judgments and the execution of such conveyances it was alleged the defendant had been guilty of fraud and as to such fraudulent transactions the plaintiff had no

knowledge until a few weeks before the commencement of his suit.

In holding such allegations of ignorance at one time and of knowledge at another to be of no effect, the Court referred to such judgments and conveyances in the following language:

> "The judgments confessed were of record, and he knew it. It could not have been difficult to ascertain, if the facts were so, that they were shams. The conveyances to Alvin and Keller were also on record in the proper offices."

In Noyes v. Hall, 97 U. S. 34, 37, the Supreme Court of the United States had this to say:

> "Deeds, mortgages, and other instruments of writing which are authorized to be recorded, take effect, by the law of that State, from and after the time of filing the same for record, and operate as notice to creditors and subsequent purchasers. Rev. Stat. of Illinois, 1874, 278, sect. 30.
>
> Argument to show that the respondent had due notice of the claim of the complainant is quite unnecessary; as the case shows, beyond controversy, that the deed under which he acquired the title to the premises was duly recorded, and that he was, before that time, in the open, visible, and exclusive possession of the same, which, by the settled law of that State, is constructive notice to creditors and subsequent purchasers. Truesdale v. Ford, 37 Ill. 210.
>
> Record evidence of a conveyance operates as notice, and so may open possession: the rule being that actual, visible, and open possession is equivalent to registry. Cabeen v. Breckenridge, 48 id. 91; Dunlap v. Wilson, 32 id. 517; Bradley v. Snyder, 14 id. 263."

Based upon the above decision of the Supreme Court of the United States it is believed that no argument upon the part of attorney for the appellees should be necessary to show that the appellant had notice and knowledge in May, 1911, and at all times thereafter, of the Brown indenture and of its terms, provisions and covenants, and that he could not in this action attack it on the ground of fraud or mistake, or on any other ground, and that the judgment of the District Court was rightly and justly rendered and entered.

The following text will be found on page 939 of 19 Corpus Juris:

> "Sec. 145. A. WITH NOTICE OF EASEMENT.---1. In General. One who purchases land with notice, actual or constructive, that it is burdened with an existing easement takes the estate subject to the easement, and will be restrained from doing any acts which will interfere with the benefit and enjoyment of the easement to the full extent to which the party having a right thereto, who has not parted with or impaired the same, was entitled at the time when such purchaser bought. He has no greater right than his grantor to prevent or obstruct the use of the easement."

Mr. Pomeroy in his work on Equity Jurisprudence in Section 689 of Vol. 2, (Third Ed.), states the law on this proposition of appellant's knowledge of the Brown indenture and the extent to which he is bound thereby, as follows:

> "Section 689. Notice of a Prior Covenant.---On the same principle, if the owner of land enters into a covenant concerning the land, concerning its use, subjecting

it to easements or personal servitudes, and the like, and the land is afterwards conveyed or sold to one who has notice of the covenant, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it, or will be restrained from violating it; and it makes no difference whatever, with respect to this liability in equity, whether the covenant is or is not one which in law 'runs with the land.' "

In De Luze vs. Bradbury, 25 N. J. Equ. 70, the Chancellor held:

"The purchaser of land subject to a continuous and apparent easement takes it subject to the burthen of that easement, and will be restrained from doing any acts which will interfere with the benefit and enjoyment of the easement to the full extent to which the party having a right thereto, who has not parted with or impaired the same, was entitled at the time such purchaser bought."

Thus it will be seen that these appellees were not only entitled to a judgment dismissing this action, but that a court of equity should enjoin the appellant from interfering with the benefits, enjoyments, rights and privileges which the Brown indenture grants and conveys to appellees.

The law of Idaho, enacted in Section 5378 of Idaho Compiled Statutes 1919, makes the Brown indenture conclusive against appellant.

That section is as follows:

"Sec. 5378. (3114) Conclusiveness of conveyance: Bona fide purchasers. Every grant or conveyance of an estate in real property is conclusive against the grantor,

also against every one subsequently claiming under him, except a purchaser or incumbrancer, who in good faith, and for a valuable consideration, acquires a title or lien by an instrument that is first duly recorded. (R. S. Sec. 2929.)

The ruling of Judge Cavanah upon the binding and controlling force and effect of the Brown indenture is stated in the following forceful and convincing language of his opinion:

"The agreement being a release and an easement, it grants an interest in the land, as held by the Supreme Court of the State in the case of Howes v. Barmon, 11 Ida. 64, where the court said: 'On the other hand, an easement is an interest or estate in real property, and is subject to the operation of the statute of frauds.' And that being true it was entitled to be recorded as provided by section 5413 of the Idaho Statutes, which provides that 'Any instrument or judgment affecting the title to or possession of real property may be recorded under this chapter.' After it was recorded it became conclusive against Brown and every one claiming the land subsequently to him. Section 5378, Idaho Statutes. The plaintiff, after having knowledge of the instrument as it appeared upon the public records, purchased the land burdened with the existing easement, and subject to it, and has no greater rights than his grantor to prevent the assertion of the release and easement as a bar to a recovery." (R. p. 72.)

The holding of Judge Deitrich that the Brown indenture is a "release and easement" upon the property claimed by appellant and the heretofore mentioned holding of this Court that such indenture releases all claims for damages to such overflowed property, thereby affirming such

holding of Judge Dietrich, make the interpretation of such indenture by Judge Cavanah incontestable and entitle appellees to an affirmance of the judgment of dismissal.

APPELLANT IS BARRED AND ESTOPPED FROM QUESTIONING OR ATTACKING THE BROWN INDENTURE UPON THE GROUND OF FRAUD OR MISTAKE

Immediately after this action came on regularly for trial in the District Court on the 6th day of June, 1929, and before the jury was empaneled, these appellees moved the District Court, as follows:

> "Having appeared separately in this action each of the defendants, Bunker Hill and Sullivan Mining and Concentrating Company, Federal Mining and Smelting Company, Hecla Mining Company and Sunshine Mining Company, now comes and moves this court on the pleadings in this action for a judgment of dismissal of this action against it upon each of the following grounds:
>
> (a) That the amended complaint in this action does not state facts sufficient to constitute a cause of action against any of said defendants.
>
> (b) That the cause of action set forth in the amended complaint in this action is barred by the provision of Section 6617 of the Code of Civil Procedure of Idaho Compiled Statutes 1919.
>
> (c) That all of the cause of action set forth in such amended complaint referring to acts, matters and things accruing prior to four years before the commencement of this action is barred by the provision of

Section 6617 of the Code of Civil Procedure of Idaho Compiled Statutes 1919.

(d) That each of said defendants has been misjoined as a party defendant in this action with the other defendants therein.

(e) That by the indenture in writing, set forth in the answer of each of said defendants, the genuineness and due execution of which has been admitted by the plaintiff, the plaintiff in this action is barred and estopped from maintaining and prosecuting this action against each of the said defendants, Bunker Hill and Sullivan Mining and Concentrating Company, Federal Mining and Smelting Company and Hecla Mining Company.

(f) That the plaintiff is barred and estopped by the statute of limitation, his inaction, acquiescence and laches from attacking such written indenture or its force or effect or validity on the grounds of fraud, misrepresentation, concealment, ignorance or upon any other ground or reason whatever." (R. p. 57.)

After Mr. Beale, attorney for appellees, and Mr. Morrill, attorney for appellant, had each made his argument on the above motion to the District Court, the following proceedings were had in open court:

"THE COURT: This agreement is clear to me that it releases the companies from any past or future damages caused upon this property or crops by reason of the mining operations. You have released these companies for past and future damages to the land in question, or crops, by reason of their operations in running mill tailings down the river. That instrument is clear to me so far as that is concerned. There isn't any question about the language of that instrument.

MR. MORRILL: I think learned counsel, Mr. Beale, drew it as strongly as he could, but I do not think it covered this particular damage alleged here.

THE COURT: I confess I can't understand the English language if it doesn't. No, it is very clear. The only question bothering me is whether or not at this time you can come in and attack the force and effect of this instrument on the ground of fraud at this time. * * * * * *

MR. BEALE: That question is vital to this case.

THE COURT: The only question is whether they can set up the ground of fraud at this late date.

MR. BEALE: If the court please, I would rather have that question decided right now, rather than go to the expense and trouble of a long drawn out trial.

THE COURT: Yes, I think it is proper to save the parties the expense of going through a trial if the equitable defense is well taken. That is a principle of equity.

As to the next contention of the defendants on this motion for judgment on the pleadings, relative to the exhibit attached to the answer known as Exhibit "A" I believe, I have reached the conclusion, as to a portion of that contention, that is, the failure to file the affidavit required by the statute, that the execution is now admitted under the pleadings, but does not go so far as to deny the plaintiff the right to set up the defense of fraud in the execution of that instrument, provided it is not barred under the three year statute or the doctrine of laches. * * * * * *

The instrument was executed in October, 1910, and recorded on the 24th day of May, 1911, upon the public records of Kootenai County. Mr. Brown, the then

owner, executed this instrument covering this property in question on which this damage is claimed to have occurred, and conveyed it to the plaintiff some ten or eleven years afterwards. I understand the plaintiff has been the owner of the property for about six years.

MR. MORRILL: The only thing, Your Honor, if my associate and myself, in looking this question up, find that counsel is correct in his contention, why of course there will be no use for us to go on with this case, or the other cases in the same situation.

(Counsel consult)

MR. MORRILL: We have decided to let it go over the term under the circumstances, and probably we can dispose of it without a great deal of trouble on the part of counsel on both sides, especially on the part of the court. In the meantime we can look it up. I think there are at least three or four cases pending where the same question is involved. If we decide the courts are against our contention, and in favor of the contention of counsel, we might as well dismiss the cases. For that reason we have agreed to let the cases go over and abide the result of the searching of the law.

THE COURT: Under the statement of counsel that it is not the desire to try the case this term, I will take the motion under advisement and if you desire fifteen days to file briefs. * * * * * *

MR. BEALE: You have also decided as to the validity of the instrument?

THE COURT: Yes. It is just the question as to whether or not it is too late to raise the question of fraud against this instrument." (R. p. 58.)

The appellant having admitted the genuineness and due execution of the Brown indenture, Judge Cavanah, in

holding that the appellant could not attack such indenture on the ground of fraud or mistake, in his opinion had this to say:

"The three year statute of limitations relative to relief on the ground of fraud or mistake governs the time within which the plaintiff may attack the instrument, and the time commences to run on the discovery of the fraud by the aggrieved party of the facts constituting the fraud or mistake. Section 6611, Idaho Compiled Statutes. To like effect is the language of the Supreme Court in Williams v. Shrope, 30 Ida. 746, where the court said, 'The action based upon fraud must be commenced within three years from its discovery or it is barred.' The inquiry then is, Can the defense of fraud under the pleadings be set up and evidence admitted at this time? One seeking to avoid the bar of the statute must show that he has used due diligence in discovering the facts or that there was a concealment of the facts such as would prevent a person exercising ordinary diligence from discovering them. If he might with ordinary care and attention have seasonably detected it, he seasonably had actual knowledge of it. When the court can determine from the pleadings whether ordinary diligence was, or was not, used and there was no concealment as would prevent one from using due diligence from discovering the facts, it then becomes a question of law to be decided by the court. This doctrine has on several occasions been recognized by the Supreme Court of the state in referring to section 6611 of the state statutes. Stout v. Cunningham, 33 Ida. 464; Davis v. Consolidated Wagon, etc. Co., 43 Ida. 730. Recognizing then the settled principle that federal courts will accept the construction of a state statute adopted by its highest court (Northern Pac. Ry. Co. v. Meese, 239 U.

S. 614; Schaffer v. Werling, 188 U. S. 516, 518; Missouri Kansas & C. Trust Co. v. Krumseig, 172 U. S. 351; Blum v. Wardell, 270 F. 309, 313), we approach the consideration of the undisputed facts as disclosed by the pleadings relative to the provisions of the written agreement attached to the answers pertinent to the question as to whether the plaintiff, at this time, is barred and estopped from attacking the instrument on the ground that it was procured by fraud, (the genuineness and due execution having been admitted).

This written instrument having been recorded in the office of the County Recorder of Kootenai County on May 24th, 1911, the plaintiff had knowledge of its existence and terms on that date and when he became the owner of the lands in question some five years before the commencement of this action. There could be no concealment of its existence as the public records of the county are open to all and is such evidence as operates as notice to the plaintiff, a subsequent purchaser of the land. Wood v. Carpenter 101 U. S. 1291; Noyes v. Hall, 97 U. S. 34, 38. If the instrument was procured by fraud or mistake it would seem that by the use of ordinary diligence either Brown, the one who executed it some eighteen years ago, or the plaintiff, since it was recorded could have discovered it before the running of the three year statute of limitation relative to relief on the ground of fraud or mistake if there existed facts constituting fraud or mistake. The instrument remaining upon the public records for such a long period of time was notice enough to excite attention and put the plaintiff and his predecessors in interest on their guard and call for inquiry. The recording of it removed all intention to prevent inquiry or exclude suspicion of there having been any fraud or mistake used in the procuring its execution or of its provisions.

Courts uniformly declined to assist one who has slept upon his rights and shows no excuse for his laches in asserting them. Pen. Mut. Life Ins. Co. v. City of Austin, 168 U. S. 685; Willard v. Wood, 164 U. S. 502; Hays v. Port of Seattle, 251 U. S. 233, 239.

There having been an unmeasurable and unexplained length of time in the present case under circumstances permitting diligence to do what in law should have been done, in asserting the right to attack the agreement on the ground of fraud, and for such inexcusable delay the doctrine of laches and the three year statute of limitations would seem to apply and bar the plaintiff from asserting that the agreement was procured by fraud. Newberry v. Wilkinson, et al., 199 Fed. 673." (R. p. 67.)

Supported by the statutes of Idaho, the decisions of her Supreme Court, of this Court and of the Supreme Court of the United States and the indisputable record in this action, the above holdings of the District Court are absolutely incontestable.

Let the law and the decisions speak for themselves.

Before presenting them to this Court it is thought no criticism can be attached to expressing a surprise that attorneys for appellant have taken this appeal in view of the statement of Mr. Morrill in the District Court at the hearing on the motion for judgment on the pleadings, to-wit: that if he and his associate, in looking up the question, found the attorney for the defendants to be correct in his contention for the above holdings, they might as well dismiss this action and other similar actions in which they appeared. (R. p. 61.)

And this surprise is further justified when it is remem-

bered that such attorneys did not present any law or court decision to the District Court and do not in appellant's brief present any to this Court which in any manner or degree questioned or combatted such contention of the attorney for defendants (appellees).

All relief on behalf of the appellant on the ground that the Brown indenture was procured by fraud or mistake is barred by subdivision 4 of Section 6611 of Idaho Compiled Statutes 1919, which is as follows:

"Sec. 6611. (4054) Statutory liabilities, trespass, trover, replevin and fraud. Within three years:

1. * * * * *

2. * * * * *

3. * * * * *

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake. (R. S. Sec. 4054.)"

The following decisions of the Supreme Court of Idaho, which interpret subdivision 4 of Sec. 6611, supra, bar the appellant from attacking the Brown indenture, the genuineness and due execution of which he admitted, on the ground of fraud or mistake either by complaint or by defense or by cross-complaint.

The Supreme Court of Idaho in Davis v. Consolidated Wagon etc. Co., 43 Idaho, 730, in reversing the trial court for not dismissing the action and in its decision directing such dismissal, had this to say:

"However, the facts stipulated are not sufficient to

bring respondent within the rule contended for by him, in that the alleged concealment might have been sooner discovered had he exercised ordinary diligence. He ascertained , on seeking advice of counsel in July, 1917, that the statements made to him were false, and the notes were not attached. It would seem that respondent was required to promptly consult counsel when it became known to him that the notes were claimed under attachment, in order to ascertain the legal status of appellant's title thereto. Instead, he apparently is not concerned about the matter further, and sleeps on his rights for more than three years before inquiring of counsel what they may be. This is not ordinary diligence.

In the case construing C. S., sec. 6611, subd. 4, providing that in case of an action for relief on the ground of fraud or mistake, the action will not be deemed to have accrued until after the discovery of the fraud, etc., this court said:

'In cases of this character where fraud, concealment and ignorance of the facts are relied upon to suspend the running of the statute of limitations, there must have been such concealment as would prevent a person exercising due diligence from discovering the facts. What diligence was used is a question of law to be determined by the court from the complaint. Mere conclusions of law are not sufficient to remove the bar of the statute. The particulars of the discovery must be alleged. It should be stated when the discovery was made, what it was, how it was made, and why it was not made sooner.' (Stout v. Cunningham, 33 Ida. 464, 196 Pac. 208.)

To like effect is the language of the court in Murray v. Chicago & N. W. Ry. Co., 92 Fed. 868, where the United States circuit court of appeals for the eighth

circuit had under consideration the application of the rule contended for by respondent as then prevailing in Iowa." * * * * *

In concluding its decision, the Court said:

"We recommend that the judgment be reversed and the cause remanded, with directions to dismiss the action."

In Stout v. Cunningham, 33 Idaho, 464, the Supreme Court of Idaho, in affirming the judgment of dismissal by the trial court, where subd. 4 of sec. 6611, supra, was involved, had this to say:

"In cases of this character where fraud, concealment and ignorance of the facts are relied upon to suspend the running of the statute of limitations, there must have been such concealment as would prevent a person exercising due diligence from discovering the facts. What diligence was used is a question of law to be determined by the court from the complaint. Mere conclusions of law are not sufficient to remove the bar of the statute. The particulars of the discovery must be alleged. It should be stated when the discovery was made, what it was, how it was made, and why it was not made sooner. The amended complaint is silent as to how the contract was obtained, neither are there any reasons assigned why the contract was not sooner obtained. In other words, the circumstances of the discovery are not fully stated. The fact that Cunningham gave out no information of his transactions with the Mainlands would not be sufficient, or the fact that the plaintiffs knew nothing of the transaction between the Mainlands and Cunningham until they procured a copy of the contract between Cunningham and the Mainlands, would likewise be insufficient to bring them

within the provisions of the statute. The general rule is announced in the case of Wood v. Carpenter, 101 U. S. 135, 25 L. ed. 807:

'In cases of this character the plaintiff is held to stringent rules of pleading . . . . , and especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether by ordinary diligence the discovery might not have been before made. This is necessary to enable the defendant to meet the fraud and the time of its discovery. A general allegation of ignorance at one time and knowledge at another are of no effect. If the plaintiff made any particular discovery it should be stated when it was made, what it was, how it was made, and why it was not made sooner."

In the case of Buchner v. Calcote, 28 Miss. 432, and Nudd v. Hamblin, 8 Allen (Mass.), 130, it is held that:

'A party seeking to avoid the bar of the statute on account of fraud must aver . . . . that he used due diligence to detect it and if he had the means of discovery in his power, he will be held to have known it.'

The fraud, if any existed, was brought home to appellants on April 30, 1907, and on May 13, 1907. Knowledge of such facts as were communicated to appellants was of such a character as to put them upon inquiry, and is equivalent to knowledge of the fraud, which being true, as appears from the facts alleged in the amended complaint, the statute of limitations barred their right of recovery and the action of the trial court in sustaining the demurrer was proper. The judgment is affirmed, with costs to respondent Cunningham."

Notice and knowledge of the existence of the Brown

indenture and of its contents "were brought home" to appellant upon its being recorded on the 24th day of May, 1911, and he is barred by subd. 4 of sec. 6611, supra, from attacking such indenture on the ground of fraud or mistake.

In Williams v. Shrope, 30 Idaho, 746, the defendants admitted the execution of the mortgage sought to be foreclosed in that action.

In this action the appellant admitted the genuineness and due execution of the Brown indenture.

In Williams v. Shrope, supra, the defendants interposed the defense that the land described in the mortgage was sold to them upon false and fraudulent representations.

In this action any attack on the Brown indenture must be on the ground that it was procured by fraud.

The defense in Williams v. Shrope, supra, against the mortgage was identically the same as any defense appellant could have offered in this action against the Brown indenture.

The Supreme Court of Idaho in Williams v. Shrope, supra, in affirming the judgment of the lower court denying the defense of the defendants, asserted on the ground of fraud, had this to say:

> "The respondent demurred to the answer and cross-complaint on the ground, among others, that the defense pleaded therein was barred by the provisions of subd. 4, sec. 4054, Rev. Codes, relating to the limitation of actions. The demurrer was sustained by the court, and the defendants declining to plead further, the evidence was submitted and a decree of foreclosure

thereupon entered, from which the defendants Shrope appeal to this court and assign as error the action of the court in sustaining the demurrer.

Assuming that the answer and cross-complaint were sufficient in form and substance to support the defense of fraud in the original sale (matters which this court does not directly pass upon because not necessary here), the only question to be passed upon is: Was the defense interposed in time or was it barred by the statute? The action based upon fraud must be commenced within three years from its discovery or it is barred. The appellants allege they discovered the fraud in 1913, but they do not negative a prior discovery in their pleading. There is nothing in their answer or cross-complaint showing that this was the first time the matter was called to their attention. But they do allege that on August 26, 1911, they paid an assessment to the irrigation district to pay interest on bonds and expenses of the district. Here, then, there was knowledge that they were included within the district and were being taxed to pay the district's bonded indebtedness. The fraud, if any existed, was brought home to them on August 26, 1911. They cannot be heard to say, after such fact is brought home to them, that they still did not know of the fraud, because knowledge of such facts as would put them upon inquiry is equivalent to knowledge of the fraud. (Citations omitted.)

We conclude, therefore, from the facts alleged in this answer and cross-complaint that the statute of limitations would commence to run on the cause of defense of the appellants on August 26, 1911, and that such would be barred August 26, 1914, nearly a year prior to the filing of the answer, and that the action of the trial court in sustaining the demurrer was proper.

The judgment is affirmed, with costs to respondent as against the appellant John Shrope."

The Supreme Court in Williams v. Shrope, supra, held that it was not necessary for it to pass upon the sufficiency or insufficiency of the defense of fraud set up by the defendants in that action, and that the only question to be passed upon by it: "Was the defense interposed in time or was it barred by the statute?"

Upon the authority of Williams v. Shrope, supra, interpreting subd. 4 of sec. 6611, supra, it was not necessary or proper for the District Court in this action to pass upon the sufficiency or insufficiency of any defense based upon the fraudulent procurement of the Brown indenture. The only question to be considered and decided by the District Court: "Was the defense interposed in time or was it barred by the statute?"

Unqualifiedly and indisputably upon the authority of the decisions of the Idaho Supreme Court such defense on the part of the appellant in this action is barred by the statute.

If there were any fraud in the procurement of the Brown indenture, under the decisions of the Supreme Court of Idaho and the decisions of the Supreme Court of the United States, appellant had notice and knowledge of such fraud on the 24th day of May, 1911, the date when the Brown indenture was recorded, and he is barred by the statute of limitation from attacking such indenture on the ground of fraud or mistake, and he is estopped on account of his laches from attacking it on any ground whatever.

That the interpretation of subd. 4, sec. 6611, supra, by the Supreme Court of Idaho, is conclusive and controlling, will appear from the following decisions:

In speaking about the construction placed by the Supreme Court of the State upon its statutes, the Supreme Court of the United States in Schaefer v. Werling, 188 U. S. 516, on page 518, said:

> "Of course, the construction placed by the Supreme Court of a State upon its statutes is, in a case of this kind, conclusive upon this court. Forsyth v. Hammond, 166 U. S. 506, 518, and cases cited."

In Missouri, Kansas & C. Trust Co. v. Krumseig, 172 U. S. 351, the Supreme Court of the United States, on page 359, had this to say:

> "The local law, consisting of the applicable statutes as construed by the Supreme Court of the State, furnishes the rule of decision."

In Northern Pacific Railway Co. v. Meese, 239 U. S. 614, Mr. Justice McReynolds, in delivering the opinion of the Supreme Court, on page 619, said:

> "It is settled doctrine that Federal courts must accept the construction of a state statute deliberately adopted by its highest court. Old Colony Trust Co. v. Omaha, 230 U. S. 100, 116; Fairfield v. Gallatin, 100 U. S. 47, 52. The Supreme Court of Washington in Peet v. Mills construed the statute in question and we think its opinion plainly supports the holding of the District Court and is in direct opposition to the conclusion reached by the Circuit Court of Appeals." * * * * *
>
> "The judgment of the Circuit Court of Appeals must be reversed and the action of the District Court affirmed."

In the case of Blum v. Wardell, 270 Fed. 309, on page 313, Judge Rudkin said:

> "The plaintiffs further contend that this court is not bound by the construction placed upon the laws of California by the highest court of the state. With this contention I am unable to agree."

In Newberry v. Wilkinson, 199 Fed. 673, on page 683, District Judge Wolverton, in delivering the opinion of this Court, said:

> "Further than this, it is settled that the federal courts will adopt and follow the decisions of the highest courts of the states in construing and applying local statutes of limitation. Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316."

In Bauserman v. Blunt, 147 U. S. 647, cited by this Court in Newberry v. Wilkinson, supra, the Supreme Court of the United States, in addition to holding that the construction given by a Supreme Court of the State to a statute of limitation of the State, will be followed by the Supreme Court of the United States, even in a case decided the other way in the Circuit Court before the decision of the State court, held as follows:

> "The bar of the statute cannot be postponed by the failure of the creditor to avail himself of any means within his power to prosecute or to preserve his claim."

and cited and approved its language in Amy v. Watertown. No. 2, 130 U. S. 320, 325, to-wit:

> "But when a party knows that he has a cause of action, it is his own fault if he does not avail himself of those means which the law provides for prosecuting his claim, or instituting such proceedings as the law regards sufficient to preserve it."

In Amy v. Watertown. No. 2, supra, in stating the rule respecting a state statute of limitation, the Supreme Court said:

"The general rule is that the language of the act must prevail, and no reasons based on apparent inconvenience or hardship can justify a departure from it."

In Wood v. Carpenter, supra, where a statute of limitation of the State of Indiana was under consideration, the Supreme Court of the United States said:

"The fraud intended by the section which shall arrest the running of the statute must be one that is secret and concealed, and not one that is patent or known. Martin, Assignee, &c. v. Smith, 1 Dill. 85, and the authorities cited.

'Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.' Kennedy v. Greene, 3 Myl. & K. 722.

'The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it.' Angell, Lim., sect. 187 and note.

A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it."
* * * * *

"Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude

suspicion and prevent inquiry.

There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself."

Referring to statutes of limitation, the Court said:

"Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed is itself a conclusive bar."

The statute of Idaho and the decisions of the courts, both Federal and State, so completely support and uphold the ruling of the District Court, that appellant is barred from attacking the Brown indenture on the ground of fraud or mistake, as to make such ruling incontestable.

NO PROOF OFFERED AT THE TRIAL AS TO FRAUD OR MISTAKE

Notwithstanding the District Court on September 4th, 1929, made an order denying the motion of the defendants for judgment on the pleadings, and that this action came on for trial before the Court without a jury, a jury having been waived in writing by the parties, plaintiff and defendants, no proof whatever was offered at the trial on behalf of appellant as to any fraud or mistake in the procurement of the Brown indenture, and no such proof could have been offered since this indenture was not pro-

cured by fraud or mistake.

As stated by Judge Cavanah: "There isn't any question about the language of that instrument." * * "No, it is very clear." (R. p. 59.)

It has never been suggested or intimated that Brown ever questioned his indenture or ever expressed any disapproval of any of its terms, provisions or covenants.

Its language is so intelligible and unambiguous as to preclude any attack, at law or in equity, upon its contents or due execution.

APPELLANT IS ESTOPPED BY HIS LACHES FROM ATTACKING THE BROWN INDENTURE ON ANY GROUND OR FOR ANY REASON

To permit the appellant to deprive the appellees of the rights and privileges granted and conveyed to them by Brown on October 17th, 1910, and of which grant and conveyance appellant had notice and knowledge over sixteen years before the commencement of this action, and during the enjoyment of which rights and privileges these appellees have built up the great mining industry described in the amended complaint, would not only work an irreparable injury upon them, but would be tantamount to a cancellation of the Brown indenture in a suit commenced by the appellant for that purpose, after his long period of acquiescence in the enjoyment by appellees of such rights and privileges, and would result in a confiscation of the properties of appellees in the County of Shoshone, Idaho, since there is dependent upon the determina-

tion of this action the most vital question as to whether they shall continue to enjoy the benefits guaranteed to them by the Brown indenture and by more than two hundred similar indentures, or be subjected to the blighting and ruinous consequences of hundreds of actions based upon exorbitant and extortionate demands for money.

There would be no difference, in effect, between the suspension of the mining and milling operations of these appellees by the injunctive decree of a court of equity and the closing of such mining and milling operations in satisfaction of claims, the aggregate amount of which would cripple, if not exhaust, the treasury of the United States.

In affirming a judgment of the lower court in dismissing the bill, Mr. Justice White, who wrote the unanimous opinion of the Supreme Court of the United States in Penn. Mutual Life Insurance Co. v. City of Austin, 168 U. S. 685, in an exhaustive and conclusive manner reviewed the former decisions of that Court in its unvarying enforcement of the *doctrine of laches,* as follows:

> "In Speidel v. Henrici, 120 U. S. 377, 387, the court said, speaking through Mr. Justice Gray:
>
> 'Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them.' 'A court of equity,' said Lord Camden, 'has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive and does nothing. Laches and neglect are always dis-

countenanced; and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court.'

In Galliher v. Cadwell, 145 U. S. 368, 371, speaking through Mr. Justice Brewer, it was said:

'The question of laches turns not simply upon the number of years which have elapsed between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during the lapse of years. The cases are many in which this defense has been invoked and considered. It is true that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all.'

In Hammond v. Hopkins, 143 U. S. 224, 250, through Mr. Chief Justice Fuller, the court said:

'No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred.'

In Willard v. Woods, 164 U. S. 502, 524, the court said:

'But the recognized doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time may be applied in the discretion of the court, even though the laches are not pleaded or the bill demurred to. Sullivan v. Portland & Kennebec Railroad, 94 U. S. 806, 811; Lansdale v. Smith, 106 U. S. 391, 394; Badger v. Badger, 2 Wall. 87, 95.'

In Lane & Bodley Co. v. Locke, 150 U. S. 193, and Mackall v. Casilear, 137 U. S. 566, it was held that the mere assertion of a claim, unaccompanied with any act to give effect to the asserted right, could not avail to keep alive a right which would otherwise be precluded because of laches. Indeed, the principle by which a court of equity declines to exert its powers to relieve one who has been guilty of laches as expressed in the foregoing decisions has been applied by this court in so many cases besides those above referred to as to render the doctrine elementary."

In Upton, Assignee, v. Tribilcock, 91 U. S. 45, 55, the Supreme Court said:

"Mere lapse of time, where a party has not asserted his claim with reasonable diligence, is a bar to relief. Relief is not given to those who sleep on their rights. Beckford v. Wade, 17 Ves. 87-97; Jones v. Tuberville, 2 Ves. Jr. 11."

In Hays v. Port of Seattle, 251 U. S. 233, on page 239 the Supreme Court said:

"But in the equity practice of the courts of the United States (excepted from the Conformity Act, see Rev. Stats., Sections 913-914) laches is a defense that need not be set up by plea or answer. It rests upon the long-established doctrine of courts of equity that their extraordinary relief will not be accorded to one who delays the assertion of his claim for an unreasonable length of time, especially where the delay has led to a change of conditions that would render it unjust to disturb them at his instance."

In Barnette v. Wells Fargo Nat. Bank, 270 U. S. 438, the Supreme Court, in affirming the decree of this Court which reversed a decree of the District Court, in a suit

brought to set aside a deed upon the ground of duress, where the plaintiff had delayed for more than three years, said:

> "In that situation she was subject to the requirement of equity that an election to disaffirm and to recall the legal consequences of an act which has operated to alter legal rights by transferring them to others, must be exercised promptly. Andrews v. Connolly and other cases cited, supra, show how this requirement is applied in cases of duress. The principle has a like application where the right is founded on fraud. Upton, Assignee, v. Tribilcock, 91 U. S. 45, 54, 55; Wheeler v. McNeil, 101 Fed. 685; Blank v. Aronson, 187 Fed. 241."

In Ancient Egyptian Order v. Michaux, 279 U. S. 737, the Supreme Court of the United States on June 3d, 1929, rendered a decision upholding and enforcing the doctrine of laches which had prevailed in that Court for ages. That case went to the Supreme Court of the United States on Certiorari, and that Court reversed the decree of the Supreme Court of Texas for refusing to hold that the plaintiffs were barred from the relief sought on account of their acquiescence and laches.

One of the conclusions of the State Court was:

> "The plaintiff, the plaintiff-intervenor, and the other plaintiff-intervenors herein have not been guilty of such laches or delay, or acquiescence as to defeat their right to the issuance of the injunction."

In passing upon this matter the Supreme Court of the United States had this to say on page 746:

> "That matter is whether there was acquiescence or laches on the part of the white order. The state court held there was neither. If there was either, the white

order was without any right to object to the use which it was seeking to restrain and the negro order was entitled to continue that use in virtue of its incorporation under the Act of Congress.

An attentive examination of the record discloses not only that the finding on the question of laches is without fair support in the evidence, but that the evidence conclusively refutes it."

In this action the record discloses beyond controversy that appellant is barred by his delay, acquiescence and laches.

The Supreme Court of the United States further said:

"Thus it is established that from the beginning the white order had knowledge of the existence and imitative acts and practices of the negro order. In addition, the evidence indubitably shows that with such knowledge the white order silently stood by for many years while the negro order was continuing its imitative acts and practices and was establishing new lodges, enlarging its membership, acquiring real property in its corporate name, and investing substantial sums in the copied paraphernalia, regalia and emblems. * * * * *

The effect on the negro order of the silence and apparent acquiescence of the white order is reflected in the fact that when this suit was brought the former had 76 local lodges, approximately 9,000 members and real and personal property valued at approximately $600,000 which was held and used for fraternal and charitable purposes."

The effect of the acquiescence and laches of the appellant, who had notice and knowledge of the Brown indenture as early as May, 1911, is reflected in the allegation of the amended complaint that the business and mining

operations of the appellees "has now become the principle industry of Shoshone County, in the Coeur d'Alene Mining District Idaho;".

If the Supreme Court of the United States would protect an organization that had accumulated a property valued at approximately $600,000, should not this Court protect the operations of these appellees that have created the principal industry in the County of Shoshone, Idaho, and enabled them to distribute millions of dollars for wages, supplies, equipment, freight, treatment and dividends, and to launch upon the channels of industry, trade and commerce in the United States millions of newly created wealth; operations authorized and protected by the Brown indenture which conveys to appellees the unhampered right to pursue such operations and makes the lands claimed by the appellant subject to all the consequences of all such operations?

As decisive authority of the right and power of this Court to affirm the judgment of the District Court dismissing this action, there is submitted the following conclusive language of the Supreme Court of the United States:

> "What we have said of the evidence demonstrates, as we think, not only that there was obvious and long continued laches on the part of the white order, but also that the circumstances were such that its laches barred it from asserting an exclusive right, or seeking equitable relief, as against the negro order. * * *
>
> Decree reversed." (Pages 748, 749.)

TRIAL BEFORE THE DISTRICT COURT

At the trial at the November 1929 term of the District

Court, on the 10th day of December, A. D. 1929, Mr. Merritt on behalf of plaintiff, appellant herein, made certain offers of proof (R. p. 74.), to which defendants, appellees herein, made the following objections (R. p. 87.):

"MR. BEALE: At this time the Bunker Hill and Sullivan Mining and Concentrating Company, Federal Mining and Smelting Company and Hecla Mining Company, defendants in this action No. 1004, object, and each of them objects to all the offers of proof of the plaintiff in this action and to each and every part thereof for the reason that all of said offers of proof are, and each and every part thereof is incompetent and immaterial and should not be received in evidence or in testimony in this action in proof of any of the allegations, matters and things alleged in the amended complaint of the plaintiff, Christ Luama, in this action, since all of said offers of proof are, and each and every part thereof is insufficient to prove any of the allegations, matters and things alleged in said amended complaint, and insufficient to prove a case for the Court in this action, or a case against said defendants or against any of them, and all of said offers of proof fail, and each and every part thereof fails to prove a sufficient case for the Court in this action, or a sufficient case against said defendants or against any of them.

Said defendants object and each of them objects to the patent from the United States of America, mentioned in said offers of proof, as incompetent and immaterial, and to all of the deeds and the records thereof, mentioned in said offers of proof, as incompetent and immaterial, and to all of the portions and parts of said offers of proof relative to the damage of said plaintiff or of any of his property, to the ownership, title and possession of said plaintiff to the lands and premises,

mentioned and described in said amended complaint, to the damage or depreciation of said lands and premises or of any part thereof, or the productivity or non-productivity thereof, to the character of said lands and premises, to the condition of the soil thereof, to the improvements thereon, to the crops growing on said lands and premises or on any part thereof or that may have grown thereon at any time, to the market value of said crops or of any of them, to the loss or damage of said crops or of any of them, to the overflow of said lands and premises at any time by the water of the Coeur d'Alene River, or at all, to the deposit of mud, slimes, tailings, debris, deleterious and poisonous substances or of any thing else on said lands and premises or on any part thereof, to the deposit on said lands and premises or on any part thereof of anything from any of the mills and concentrators of said defendants or of any of them, to the character of anything deposited upon said lands and premises or upon any part of them, to anything dumped into the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and their tributaries or dumped at all by said defendants in the operation of their mills and concentrators or of anything else, or in the milling of ore from the mines or from anything else of said defendants or of any of them, or at all, to where the tailings, debris, slimes, deleterious and poisonous substances, mentioned in said offers of proof, came from, to who produced them, to the mills and concentrators and operations thereof, to who operated them, to all operations of said defendants or of any of them, to all matters and things that refer to said plaintiff, said lands and premises, all deposits thereon and overflows thereof, and all crops of every character, and to all acts, matters and things on the part of said defendants or of any of them, mentioned in said offers of proof, as

incompetent and immaterial, and in this connection said defendants direct the attention of this Court to the fact that it has been held and decided by this Court that the instrument dated the 17th day of October, A. D. 1910, mentioned and referred to in said offers of proof, a copy of which is marked Exhibit "A" and made a part of the answer of said defendants, is an easement and release running with the said lands and premises, and that said lands and premises are subject to and bound by said instrument and all of its terms, provisions and covenants, and that said instrument released and releases said defendants Bunker Hill and Sullivan Mining and Concentrating Company, Federal Mining and Smelting Company and Hecla Mining Company and each of them from all acts and consequences of all acts, mentioned and referred to in said offers of proof, on their part, or on the part of any of them, and from all acts and consequences thereof with which said defendants are or any of them is charged in said amended complaint, and from all damages referred to in said offers of proof, and from all damages resulting from all acts and things with which the said defendants and each of them are charged in said offers of proof and in said amended complaint, and from all damages resulting from all mining and milling operations on the part of said defendants Bunker Hill and Sullivan Mining and Concentrating Company, Federal Mining and Smelting Company and Hecla Mining Company, and on the part of any of them, and from all damages resulting from the use of the waters of the South Fork of the Coeur d'Alene River and its tributaries and of the Coeur d'Alene River in all such operations, and from all damages resulting from the dumping of all tailings, waste material and debris, that may have resulted from such mining and milling operations, into

the waters of the South Fork of the Coeur d'Alene River and its tributaries and of the Coeur d'Alene River, or elsewhere, and from all damages resulting from the transportation and carrying away of all such tailings, waste material and debris by the waters of the South Fork of the Coeur d'Alene River and its tributaries and by the waters of the Coeur d'Alene River, and from all damages resulting from the depositing of such tailings, waste material and debris upon said lands and premises or upon any part thereof, and from all damages resulting from all past and future mining and milling operations of said defendants and of each of them, and from all damages resulting from the past and future use by said defendants and each of them of the waters of the South Fork of the Coeur d'Alene River and its tributaries and of the waters of the Coeur d'Alene River in all such past and future mining and milling operations, and from all damages resulting from all dumping of tailings, waste material and debris, resulting from such past and future operations by said defendants and each of them, into said waters, and from all damages resulting from the transportation and carrying away by said waters of said tailings, waste material and debris, and from all damages resulting from all past and future depositing of said tailings, waste material and debris upon said lands and premises or upon any part thereof, and from all damages to said lands and premises and to each and every part thereof, and from all damages to the lands and premises and the crops, horses and cattle, mentioned and referred to in said offers of proof, and from all damages to said plaintiff mentioned in said offers of proof and in said amended complaint.

Said defendants object and each of them objects to each and every part of said offers of proof relative to

horses and cattle, as incompetent, immaterial and not responsive to any issue or issues in this action.

Said defendants object and each of them objects to each and every part of said offers of proof relative to a concert of action and accord as incompetent, immaterial and not responsive to any issue or issues in this action, and as too remote, uncertain, indefinite, and for the reason that there are no facts pleaded in said amended complaint showing concert of action or accord on the part of said defendants or on the part of any of them.

Said defendants object and each of them objects to each and every part of said offers of proof relative to the dams mentioned therein, as incompetent, immaterial and not responsive to any issue or issues in this action, and for the further reason that all such matters and things relative to said dams, mentioned in said offers of proof, are barred by the provision of Section 6617 of the Code of Civil Procedure of Idaho Compiled Statutes 1919.

Said defendants object to and each of them objects to each and every part of said offers of proof relative to the agents, attorneys and employees of said defendants, or to any of them, to what they did or said or protested, to whom they said or protested anything whatever, to anything they or any of them said to the County Commissioners or taxing authorities of Kootenai County, Idaho, or to any of them, or said or protested to or requested of any Attorney General of the State of Idaho, or to any one or at all, concerning or about any tax matter whatever or any assessment or taxation or any assessment or taxing of said instrument or anything else, or to anything said agents, attorneys and employees or any of them said or did at any time or place or at all as incompetent, immaterial, hear-

say, indefinite, uncertain, not the best evidence, and as barred and prohibited by the provision of Section 7974 of the Code of Civil Procedure of the Idaho Compiled Statutes 1919, and as coming within the inhibition and prohibition of the Statute of Frauds of Idaho, and as not constituting any cancellation or forfeiture of said instrument or of any of its terms, provisions or covenants, or any cancellation or forfeiture of said instrument or any of its terms, provisions or covenants by said defendants or by any of them, or any cancellation or forfeiture of any right or privilege of said defendants or of any of them under and by virtue of said instrument and its terms, provisions and covenants, and as not showing that either said plaintiff or any of his predecessors in interest in said lands and premises ever heard of or ever acted upon anything said agents, attorneys and employees or any of them ever did or said or protested or requested as mentioned in said offers of proof, or at all."

Actuated by the purpose to advise fully the trial court and to meet every item and phase of appellant's offers of proof, appellees submitted at length and in detail their objections thereto, and quote in full herein such objections for the convenience of this Court and in support of their contention that those objections were, without doubt or controversy, properly sustained by the District Court.

The District Court having held that the Brown indenture permitted the appellees to perform all acts, with which they are charged in the amended complaint, and released them from all consequences and damages claimed by the appellant, and that all of the alleged properties of the appellant were, by the terms, provisions and covenants of such indenture, made subject to and charged with all such

acts, consequences and damages, it must follow that all offers of proof relative to such properties, acts, consequences and damages were both incompetent and immaterial, and this is particularly true when it is remembered that the Brown indenture was held by District Judge Dietrich in the Polak case to be a release and easement preventing the owner of the property claimed by appellant from asserting such a claim as is involved in this action, and that this Court in the Polak case affirmed such holding of Judge Dietrich, and such holdings apply to and include the claim asserted by appellant in this action.

Notwithstanding it is alleged in the amended complaint (R. p. 24.) that it was "the excessive overflow in the winter of 1917 and January 1918," that "so weakened and impaired" the "low or meadow land", that such land, which before such excessive overflow produced "an average of three tons of timothy hay per acre," and "that after the high waters of December 1917, and January 1918, the plaintiff received and produced less than one ton of hay per acre on the same lands," (against which excessive overflow and all consequences thereof appellees are protected by the terms, provisions and covenants of the Brown indenture,) in the offers of proof at the trial no mention was made of the excessive overflow or of any weakening or impairment of such low or meadow land or failure of crop production thereon on account of such excessive overflow. But instead in such offers of proof an attempt was made to switch to four causes of action upon suggested overflows of such land during the years 1924, 1925, 1926 and 1927, against which overflows and all damages resulting therefrom appellees are also protected

by the terms, provisions and covenants of the Brown indenture.

It is too plain for argument that it was the duty of the District Court to sustain the objections to such offers of proof not only for the reason the appellees were protected against them by the Brown indenture but for the further reason that the trial court could not permit the appellant to switch his cause of action based upon the alleged excessive overflow, to four different causes of action, not pleaded in the amended complaint, based upon four different overflows, one in 1924, one in 1925, one in 1926 and one in 1927. (R. p. 81.)

No causes of action having been alleged in the amended complaint relative to overflows during the years 1924, 1925, 1926 and 1927, no opportunity was afforded appellees to plead to such causes of action, and at the trial no evidence could have been properly or legally admitted relative to these causes of action.

If such causes of action existed they should have been presented separately in the amended complaint.

In Alabama Great Southern R. Co. v. Shahan, 22 So. 509, will be found the following language in the syllabus, to-wit:

> "In an action for injuries resulting from the negligent obstruction of defendant's culvert, a count which avers injuries from several distinct overflows is bad, as improperly joining separate and distinct causes of action."

In the body of the opinion the court said:

> "We are of the opinion, however, that each of these counts were subject to demurrer upon another ground.

Each count avers injury resulting from an overflow in March and an overflow in August, 1891, and separate overflows in February, March and August, 1892. These were separate and distinct torts inflicting separate and distinct injuries, each furnishing a separate and distinct cause of action, and to which there may be separate and different defenses. All these could be joined properly in one complaint, but should be presented in different counts. It is not permissible to unite in one count several torts, constituting distinct and separate causes of action. The grounds of demurrer to these counts raised this objection and should have been sustained." (Reversed.)

In the offers of proof will be found a statement that 36 head of cattle and some horses were pastured on the bottom lands in 1923 and that none of them died or were made sick from eating vegetation growing on such lands and that they were kept in good healthy condition; and the further statement that in 1928 three of plaintiff's horses were taken sick and died immediately after feeding for two or three days on vegetation growing on such bottom lands; that one died in May, one in July and the third in September, 1928. (R. p. 79.)

It will be noted that of the 36 head of cattle and the horses that were pastured on the bottom lands in 1923 none died or were made sick from eating vegetation growing on such lands. It will be further noted that it is not stated that the three horses that were taken sick and died in 1928 were sickened or died *from* feeding on the vegetation growing on such bottom lands but *after* feeding on such vegetation. It is not claimed that such vegetation sickened or killed these horses. Nor does it show what

were the dates of the two or three days these three horses were feeding on the vegetation growing on these bottom lands, or that these horses were ever on the lands prior to the commencement of this action. Nor does it appear that these bottom lands were ever overflowed. A dozen different things might have caused the death of one of these horses in May, the death of another in July and the death of the third in September, 1928, long after they had been feeding for two or three days on such vegetation.

Appellees objected to this uncertain and meaningless offer of proof as incompetent, immaterial and not responsive to any issue or issues in this action. (R. p. 92.)

There is absolutely no allegation or reference in the amended complaint as to any of such cattle or horses. There is no prayer for judgment in the amended complaint for damages on account of the sickness or death of any such cattle or horses. Nor does appellant anywhere in his offers of proof make any claim for damages on account of the sickness or death of any such cattle or horses.

Furthermore these appellees never had any opportunity to test or plead to any allegations relative to such cattle and horses.

Under no rule of pleading or evidence could the District Court have admitted any evidence relative to such cattle or horses.

There being no issue as to these cattle and horses, under the first rule of evidence the offered proof as to them could not be received.

Mr. Greenleaf, in his work on Evidence, in Section 51 of Vol. I, stated the rule as follows:

"And it is an established rule, which we state as the

FIRST RULE, governing in the production of evidence, that the evidence offered must correspond with the allegations, and be confined to the point in issue."

Circuit Judge Day, in the opinion of the Circuit Court of Appeals for the Sixth Circuit, in Ferguson Contracting Co. v. Manhattan Trust Co. 118 Fed. 791, 795, affirming the ruling of the Circuit Court in refusing to receive testimony upon a matter not set up in the cross bill, said:

"It is elementary law that the proof and the allegations must correspond."

The following test will be found on page 537 of 22 Enc. Pl. & Prac.:

"REASON AND OBJECT OF RULE.---The rule that the allegations and proof must correspond is intended to answer the double purpose of distinctly and specifically advising the opposite party of what he is called upon to answer, so as to enable him properly to make out his case and to prevent his being taken by surprise in the testimony at the trial, and of preserving an unerring record of the cause of action as a protection against another proceeding based upon the same cause."

However, viewed from every angle, appellees by the terms, provisions and covenants of the Brown indenture are protected against and released from any recovery on account of the sickness and death of any cattle or horses caused from pasturing upon any of the lands, claimed by the appellant, upon which the waters of the Coeur d'Alene River may have transported and deposited any tailings, waste material and debris produced by the mining and milling operations of the appellees.

There were inserted in the offers of proof certain statements that at the date of the Brown indenture the ap-

pellees and others were maintaining, and prior thereto had maintained two impounding dams on the Coeur d'Alene River for the purpose of impounding and holding tailings, debris and poisonous substances dumped into the Coeur d'Alene River and tributaries and that such dams did impound such tailings, debris and poisonous substances; that in the month of December 1917 and in the month of January 1918 said dams were carried away and destroyed by the waters of the Coeur d'Alene River; that a large portion of the tailings, debris and poisonous substances impounded by said dams was washed down the Coeur d'Alene River and deposited in the bed and channel thereof, and that the appellees and others failed, neglected and refused to reconstruct such dams. (R. p. 81.)

To each and every part of the offers of proof relative to these dams appellees objected as incompetent, immaterial and not responsive to any issue or issues in this action, and for the further reason that all matters and things relative to such dams were barred by the provision of Section 6617 of the Code of Civil Procedure of Idaho Compiled Statutes 1919. (R. p. 92.)

It will be noted that it is not claimed in the offers of proof that any of the tailings, debris or poisonous substances that may have been impounded in such dams was ever deposited on the lands claimed by the appellant, or that such lands or any properties of appellant were injured on account of these dams, on account of their destruction, or on account of anything washed out of the same.

There is not a word or syllable in the amended complaint relative to these dams.

If appellant had alleged in the amended complaint a cause of action for injury to his lands and properties on account of the breaking of these dams and of the depositing on such lands and property of any tailings, debris and poisonous substance that had washed out of such dams when the same were destroyed in December 1917 and January 1918, such cause of action would have been barred by the statute of limitations. The appellant not having alleged anything in the amended complaint relative to these dams, not having complained of any damage to any of his property on account of anything that was washed out of such dams when they were destroyed in December 1917 and January 1918, and being confronted with the fact that any cause of action alleged in the amended complaint based upon injury to his lands or property on account of the destruction of such dams and the washing of anything out of them by the waters of the Coeur d'Alene River in December 1917 and January 1918, would be barred by the statute of limitation, no possible excuse can be offered for injecting into the offers of proof the incompetent, irrelevant, unpleaded matter relative to such dams.

The inexcusable incorporation of such matter into the offers of proof is further emphasized by the fact that the damages claimed by the appellant in his offers of proof are predicated on loss of crops for the years 1924, 1925, 1926 and 1927, and depreciation of lands involved in this action by the acts of appellees depositing tailings, debris, deleterious and poisonous substances from their mills and concentrators into the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries and

along the banks thereof during the years 1924, 1925, 1926 and 1927. (R. p. 80.)

Properly and rightly the District Court refused to receive any evidence relative to these dams, a matter not in issue and a matter upon which appellant makes no claim for damages.

The above decision written by Circuit Judge Day and the text in Greenleaf and 22 Enc. Pl. & Prac. supra, are conclusive upon the proposition that the trial court followed the rule of evidence and decision in not admitting the offers of proof as to such dams.

Furthermore, there is no allegation in the amended complaint and nothing in the offers of proof showing that Brown knew anything about the dams, or that the dams in any manner entered into the execution of his indenture, or that appellees ever promised Brown to maintain such dams, or that the appellant considered the dams when he claims to have purchased the Brown property, and if the same had appeared in the amended complaint, in the offers of proof or in the record, no testimony could have been admitted relative thereto under the ancient rule of evidence which would not permit parol testimony to be received to contradict, vary, add to, or subtract from the terms of the Brown indenture.

Under the circumstances should not these appellees be permitted to state the fact that they never constructed or maintained any dam in the Coeur d'Alene River?

While it is not claimed in the offers of proof that any of such tailings, waste material and debris that might have been carried and transported out of the dams by the waters of the Coeur d'Alene River were ever deposited

on such lands, it would be immaterial if such tailings, waste material and debris had been deposited on such lands, as it is specifically granted and covenanted in the Brown indenture that such lands are forever subject to and charged with the right and privilege of appellees of having all such tailings, waste material and debris transported and carried away by the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries.

And it does not make any difference whether in such transportation and carrying away of such tailings, waste material and debris, such waters transported and carried them into a dam and then transported and carried them out of a dam, or transported and carried them away without any dam.

There is absolutely no limitation in the Brown indenture as to how or in what manner such tailings, waste material and debris shall be transported and carried away by the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries, and there is no authority or power in the courts to insert or interpolate any limitation into the Brown indenture.

In French v. Shoemaker, 14 Wall. 314, 335, the Supreme Court of the United States said:

> "Parties who execute contracts must expect that they will be enforced when due application for that purpose is made to a court of justice, nor can they reasonably hope that courts of justice will reopen matters which they have voluntarily and understandingly closed."

In Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 462, the Supreme Court of the United States said:

"It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

The above language in the Coos County case has been quoted and approved by this Court.

There are certain statements in the offers of proof (R. p. 85.) to the effect that the agents, attorneys and employees of defendants (appellees) protested against the instrument (the Brown indenture) dated the 17th day of October, A. D. 1910, marked Exhibit "A" and made a part of the answer of said defendants, being listed for taxation or assessment and taxed to said defendants; that said attorneys, agents and employees appeared, a number of times, before the County Commissioners and taxing authorities of Kootenai County, Idaho, and protested against the same being assessed and taxed against said defendants, and also appeared before the Attorney General of the State of Idaho and requested said Attorney General to notify the taxing authorities of Kootenai County, Idaho, that same should not be taxed to said defendants; that after the commencement of this action and some twelve or fifteen other actions involving the same questions, and like instruments, and damage to lands and crops on the Coeur d'Alene River, as herein involved, the Assessor of Kootenai County, Idaho, listed for taxation said instrument and all other like instruments, and there-

upon a tax was levied and assessed upon said instruments in the sum of $3220.78; that said tax was paid on the 12th day of December, 1928; that for the year 1929 a tax was levied and assessed upon said instruments in the sum of $3386.47, and that the tax paid on the 12th day of December, 1928 was the first and only assessment and tax that has been paid on said instruments. Such statements were hereinbefore summarized and reviewed.

In addition to their objection (R. p. 87.) that each and every part of the above offers of proof of appellant was incompetent and immaterial and could not be received in evidence or in testimony in this action in proof of any of the allegations, matters and things alleged in the amended complaint of the plaintiff (appellant) in this action, these appellees further objected as follows: (R. p. 93.)

> "Said defendants object to and each of them objects to each and every part of said offers of proof relative to the agents, attorneys and employees of said defendants, or to any of them, to what they did or said or protested, to whom they said or protested anything whatever, to anything they or any of them said to the County Commissioners or taxing authorities of Kootenai County, Idaho, or to any of them, or said or protested to or requested of any Attorney General of the State of Idaho, or to any one or at all, concerning or about any tax matter whatever or any assessment or taxation or any assessment or taxing of said instrument or anything else, or to anything said agents, attorneys and employees or any of them said or did at any time or place or at all as incompetent, immaterial, hearsay, indefinite, uncertain, not the best evidence, and as barred and prohibited by the provision of Section 7974 of the Code of Civil Procedure of the Idaho Compiled Statutes 1919, and as

coming within the inhibition and prohibition of the Statute of Frauds of Idaho, and as not constituting any cancellation or forfeiture of said instrument or of any of its terms, provisions or covenants, or any cancellation or forfeiture of said instrument or of any of its terms, provisions or covenants by said defendants or by any of them, or any cancellation or forfeiture of any right or privilege of said defendants or of any of them under and by virtue of said instrument and its terms, provisions and covenants, and as not showing that either said plaintiff or any of his predecessors in interest in said lands and premises ever heard of or ever acted upon anything said agents, attorneys and employees or any of them ever did or said or protested or requested as mentioned in said offers of proof, or at all."

It is inconceivable for what purpose, or upon what theory, or under what rule of pleading, practice or evidence such offers of proof were made.

There is not any allegation or reference in the amended complaint as to the levy or assessment or payment or nonpayment of any tax on the Brown indenture, or on any instrument or instruments referred to in such offers of proof, or any allegation in the amended complaint as to any protest whatever of any agent, attorney or employee of any of these appellees.

It will be noted that it is not claimed that any of such agents, attorneys or employees ever had any authority whatever to make such protest or any protest to the County Commissioners or taxing authorities of Kootenai County, Idaho, or any request of the Attorney General of Idaho.

It will be further noted that it is not claimed that those

protests were or any of them was in writing, or that the Board of County Commissioners or Assessor ever acted upon any of them, or that any record was ever made of any action upon those protests by such Board of County Commissioners or such Assessor, or that the Attorney General of Idaho ever gave any consideration to or ever acted upon said request, or that any dates were fixed when such protests were made, or any date mentioned when the request was made.

Nor is it claimed that the appellees ever protested against any tax that had been levied and assessed upon the Brown indenture or on any of the instruments mentioned in the offers of proof, or ever refused to pay any tax levied and assessed on such indenture or on any of such instruments.

In fact, it is stated that the tax levied and assessed on such instruments was paid.

It is most significant that appellant did not claim that he or any of his predecessors in interest ever heard of or ever acted upon any of said protests or upon said request or upon anything such agents, attorneys and employees or any of them ever did or said or protested or requested.

Had appellees protested against the levy and assessment of a tax on the Brown indenture it would be impossible to construe such protest into a loss or forfeiture of their rights and privileges under it, or a cancellation of such indenture or of any of its terms, provisions and covenants.

If all the property owners in the United States who have protested against the levy and assessment of taxes upon their properties had thereby lost and forfeited their

rights and privileges in or cancelled their deeds and titles to their properties, a very great many property rights and titles in this country would be in a condition of chaos.

PROTESTS VOID

Appellees cannot be deprived of their rights, privileges and protection guaranteed by the terms, provisions and covenants of the Brown indenture by any of said *void* protests.

Appellees could not forfeit or surrender their rights, privileges and protection under and by virtue of the Brown indenture, otherwise than by a conveyance or instrument in writing subscribed by them.

The rights, privileges and protection of the appellees under and by virtue of the Brown indenture could not be forfeited or surrendered by any agent, attorney or employee of the appellees, otherwise than by a conveyance or instrument in writing subscribed by such an agent, attorney or employee who had been authorized by the appellees in writing to do so.

Such is the law of Idaho.

Such is the law of Idaho as declared by the Supreme Court of Idaho and as declared by this Honorable Court.

Section 7974 of Idaho Compiled Statutes 1919 is as follows:

> "Sec. 7974. (6007) Transfers of real property to be in writing. No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation

of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing. (R. S. Sec. 667.)"

In interpreting and applying the above section the Supreme Court of Idaho in Schulz v. Hansing, 36 Idaho, 121, 125, used this conclusive language:

"Respondent's right to recover, if any exists, rests solely upon an alleged oral agreement for the transfer to appellant of an interest in real property, which oral agreement was void for the reason that it was in contravention of C. S., sec. 7974, the same not being evidenced by an instrument in writing or delivery of possession of the real property. The purported sale from Smith to respondent was void under the provisions of sec. 7974, supra, for the reason that it was not evidenced by any instrument in writing as therein provided. The mere giving of a check as evidence of good faith is not sufficient to pass title to real estate, under the laws of this state. There must be a conveyance or other instrument in writing subscribed by the party sought to be charged or his lawfully authorized agent, as was said in the recent case of Oylear v. Oylear, 35 Ida. 372, 208 Pac. 857: 'We are not disposed to hold under any view of the law that title to real estate may be transferred by word of mouth and without any written instrument purporting to convey such property, or any change of possession.'

Respondent sought to sell by word of mouth his alleged interest claimed by him in the Foren land. This he clearly could not do.

From what has been said it follows that the court erred in overruling objections to the admission of any

evidence on behalf of respondent for the purpose of showing an oral agreement between appellant and respondent."

In Lawyer v. Post, 109 Fed. 512, which involved an alleged oral change of a written agreement and a verbal agreement to sell and convey real property, this Court affirmed the judgment of dismissal of the Circuit Court of the United States for the Northern Division of the District of Idaho, and in its opinion interpreted and applied section 6007, Rev. St. Idaho, which is the same as section 7974, supra, in the following language:

"Assuming that the evidence establishes that the defendant Frederick Post verbally agreed to sell and convey such other and additional property, and that he verbally gave an additional extension of the time within which he would sell and convey both that referred to in the written option and such other and additional property, such oral agreement must be held to be void, under the provisions of section 6007, Rev. St. Idaho, which declares:

'No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it or in any manner relating thereto, can be created, granted, assigned, surrendered or declared, otherwise than by operation of law or a conveyance or other instrument in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.' "

Thus it will be seen by the provisions of the statute of Idaho, by the decision of the Supreme Court of Idaho and by the decision of this Court interpreting such statute, that the Brown indenture could not be "surrendered" or

"declared" away by any protest or request of appellees, that was not in writing, or by anything they may have said in respect to such indenture, or by any protest or request of any agent, attorney or employee of appellees, that was not in writing, and without written authority from appellees, or by anything such agent, attorney or employee may have said in respect to such indenture.

Out of the hundreds of additional decisions that could be cited that uphold the ruling of the District Court sustaining the objections of appellees to the offers of proof of appellant as to such agents, attorneys and employees and the assessment and taxation of the Brown indenture, only one thereof will be presented in this brief to this Court in addition to those quoted.

In Reid v. Diamond Plate-Glass Co., 85 Fed. 193, 195, the Circuit Court of Appeals for the Sixth Circuit, presided over by Taft and Lurton, Circuit Judges, and Clark, District Judge, which involved the exclusion of parol evidence relative to a written contract, required to be in writing by the statute of frauds of Michigan, will be found the following language which upholds beyond controversy that the offers of proof of plaintiff (appellant) relative to what the agents, attorneys and employees of defendants (appellees) protested, requested or said in relation to the Brown indenture were inadmissible, to-wit:

> "For the purpose of disposing of the question presented by the assignment of error just referred to, we are not concerned with the statute of frauds, further than to say that it could not be doubted, and is conceded, that the contract was one required by section 6186 of the Michigan statute to be in writing. It is to be further remarked that the contract was not only required to be,

but was in fact, put in writing. The contract is complete in itself, clear and unambiguous in its terms and provisions, and undoubtedly represents the deliberate engagement of the parties. Apart from any particular question of the statute of frauds, there is an ancient rule of evidence, of wide application, resting upon substantially the same principle, as the statute of frauds, which does not permit parol testimony to be received to contradict, vary, add to, or subtract from the terms of a valid written instrument. 2 Jones, Ev. 437, 438, 446; I Greenl. Ev. Sec. 275; 2 Tayl. Ev. Secs. 1132, 1133. The rule is laid down by the author of the work last cited as follows:

'Bearing the above principles in mind, the leading general rule respecting the admissibility of extrinsic evidence to affect what is in writing is that parol testimony cannot be received to contradict, vary, add to, or subtract from the terms of a valid written instrument. The common-law rule may be traced back to a remote antiquity. It is founded on the inconvenience that might result if matters in writing, made by advice and on consideration, and intended finally to embody the entire agreement between the parties, were liable to be controlled by what Lord Coke calls 'the uncertain testimony of slippery memory.' When parties have deliberately put their mutual engagements into writing, in language which imports a legal obligation, or, in other words, a complete contract, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance. Consequently all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before or after or at the time of the completion of the contract, will be rejected, because such evidence, while

deserving far less credit than the writing itself, would inevitably tend, in many instances, to substitute a new and different contract for the one really agreed upon, and would thus, without any corresponding benefit, work infinite mischief and wrong. Apart from all considerations of convenience, positive enactment has imposed the same rule in several cases. It has, by requiring certain transactions to be evidenced by writing,---as, for instance, wills, contracts within the statute of frauds, and the like,---rigidly excluded all parol testimony tending to vary the terms contained in the written instrument. The statutory rule will perhaps be more strictly enforced than that which rests on the common law alone, because, in the former case, to relax the rule in any degree is, to the like extent, to repeal the particular act which renders the writing necessary. The term 'written instrument,' for this purpose, includes, not only records, deeds, wills, and other instruments required by statute or common law to be in writing, but every document which contains the terms of a contract between different parties, and is designed to be the repository and evidence of their final intentions.' "

* * * * * * *

" 'The rule is well settled that when a contract has been reduced into writing, in plain and unambiguous terms, without any uncertainty as to the object or undertaking of the parties, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was embraced in such written contract. And in such case, in the language of Lord Denman, 5 Barn. & Adol. 64, 'verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time it was in the state of prep-

aration, so as to add to or subtract from, or in any manner to vary or qualify, the written contract.' The meaning and intention of the parties, in all such cases, must be ascertained and declared by the court from what is written in the instrument; and no extrinsic evidence of the intention of the parties from their declarations or conversations, whether at the time of executing the instrument, or before or after that time, is admissible.' "

It is believed that the following language of this Honorable Court as to the appeal in Lawyer v. Post, supra, is applicable to the appeal in this action, to-wit:

"There is, in our opinion, no merit in this appeal."

Furthermore, it was the duty of the District Court, both under the statute of Idaho and by reason of the decisions of the Supreme Court of that State, to sustain the objections of the appellees to the offers of proof as to horses and cattle, dams, and protests of agents, attorneys and employees of appellees upon the ground that there were no issues in this action concerning horses or cattle, or dams, or protests of agents or attorneys or employees of appellees, and that would be true even though there had not been any objections or answer on the part of the appellees.

It is provided in Section 6829 of Idaho Compiled Statutes as follows:

"Sec. 6829. (4353) Extent of relief. The relief granted to the plaintiff, if there be no answer, can not exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint embraced within the issue. (R. S. Sec. 4353.)"

In interpreting the language in that section, which was

copied from Section 4353 Revised Codes of Idaho, the Supreme Court in Brunzell v. Stevenson, 30 Ida. 202, 205, said:

> "Assignment numbered 2 pertains to the appointment of a water-master." * * *
>
> "In this action, however, neither party petitioned for such appointment. The court cannot grant relief not embraced within the issues (sec. 4353, Rev. Codes; Yuba County v. Kate Hayes Min. Co., 141 Cal. 360, 74 Pac. 1049), and therefore its action in directing the appointment of a water-master was erroneous."

Hence in this action, if the District Court had received the offered proofs upon those matters not in issue, its action would have been erroneous.

THE BROWN INDENTURE GRANTS AND CONVEYS AN INTEREST AND ESTATE IN THE LANDS CLAIMED BY APPELLANT

In 19 Corpus Juris, 863, will be found the following definition of an easement:

> "It is an incorporeal right---an incorporeal hereditament, and although only an incorporeal right and appurtenant to another, the dominant, tenement, it is yet properly denominated an interest in land which constitutes the servient tenement, and the expression, 'estate or interest in lands,' or 'fee or a freehold estate,' when used in a statute, is broad enough to include such rights."

In Howes v. Barmon, 11 Ida. 64, 69, the Supreme Court of Idaho said:

> "On the other hand, an easement is an interest or estate in real property, and is subject to the operation

of the statute of frauds. (Rev. Stats., sec. 6007; 14 Cyc. 1144; Pifer v. Brown, 43 W. Va. 412, 27 S. E. 399, 49 L. R. A. 497, and note; Clark v. Glidden, supra; Jones on Easements, sec. 65.)"

In Humphrey v. Krutz, 137 Pac. 806, 808, the Supreme Court of Washington said:

"An easement, although an incorporeal right, is an interest in land. Oates v. Town of Headland, 154 Ala. 503, 45 South. 910; Pacific Yacht Club v. Sausalito, etc., Co., 98 Cal. 487, 33 Pac. 322; 14 Cyc. 1139."

In Nellis v. Munson, 15 N. E. Rep. 739, 740, the Court of Appeals of New York said:

" 'Washburn, in discussing the distinction between an easement and a license, says that 'an easement always implies an interest in the land in or over which it is to be enjoyed. A license carries no such interest.' * * * *

It seems to follow, necessarily, from the authorities, that an easement to draw water through pipes over the land of another for the benefit of a dominant tenement, is an interest in lands existing independent of the fee of the land over which it is exercised, and is an estate in land possessed in fee by the owner of the dominant estate. It is an incorporeal hereditament consisting of an estate of inheritance, transferable according to the statute of descents, and comes directly within the meaning of the terms 'fee or freehold estate,' as used in section 137. That it was the intention of the grantor of the easement in question to convey a fee therein, is manifest from the language of the instrument, as it grants and conveys the interest described to the grantee and 'his heirs and assigns,' and is made obligatory upon the grantor and 'her heirs and assigns.' "

In Branson v. Studebaker, 33 N. E. Rep. 98, 103, the Supreme Court of Indiana said:

"A fee may exist in an incorporeal hereditament, and may, of course, under this principle, exist in an easement. (Citations omitted.) The general doctrine stated is recognized in the case of Waterworks Co. v. Burkhart, 41 Ind. 364, and the cases following it. (Citations omitted.) The facts contained in the special verdict make the case a much clearer and plainer one than that of Waterworks Co. v. Burkhart, supra, for here there was an acquisition of title by contract, while in that case the title of the original owner was wrested from him by condemnation proceedings. We do not affirm that the line of cases referred to are precisely in point upon all the questions in this case, but we do affirm that they necessarily, and by clear implication, establish the general principle that a fee may exist in an easement. In Burk v. Simonson, 104 Ind. 173 2 N. E. Rep. 309, and 3 N. E. Rep. 826, the existence of a perpetual right in an easement was clearly recognized. But we cannot, independently of these cases, hold that there may not be a fee in an easement, without, as we have seen, running counter to the elementary principles; nor is there anything novel or strange in the doctrine that there may be a fee in an easement, for an easement is an estate in land. (Citations omitted.) All easements are estates in land. A fee may exist in all estates in land. Therefore a fee may exist in an easement."

Brown, after setting forth in detail the damage he had sustained in the past and would sustain in the future by reason of the past and future mining and milling operations of the appellees, and their use of the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in such mining and milling operations and in the dumping of the tailings, waste material and debris from such operations into such waters, and the

use of such waters in the transportation and carrying away of such tailings, waste material and debris, for a valuable consideration satisfactory to him, and concerning which he has never made any complaint to appellees, granted, bargained, sold, conveyed and confirmed unto the appellees, and to their successors and assigns, the right and privilege to carry on and continue all mining and milling operations in which they may engage in the County of Shoshone and the County of Kootenai, State of Idaho, and the right and privilege of using the waters of such rivers and tributaries in such operations, and the right and privilege of dumping all tailings, waste material and debris that may result from such mining and milling operations into such rivers and tributaries and along their banks, and the right and privilege of having such tailings, waste material and debris transported and carried away by the said waters of said rivers and tributaries, and thereafter in his indenture made his property, and each and every part thereof, mentioned therein, subject to and charged with all such mining and milling operations, both past and future, with such use of said waters in such mining and milling operations and in the dumping of all tailings, waste material and debris resulting from such mining and milling operations into the waters of such rivers and tributaries and along their banks, and with the use of such waters of such rivers and tributaries in the transportation and carrying away of such tailings, waste material and debris.

After such detail and particularity it is inconceivable how he could have more completely subjected his property to or charged the same with the right and privilege in ap-

pellees and their successors and assigns of having such waters transport, carry away and deposit upon his property and every part thereof the tailings, waste material and debris produced by appellees in both their past and future mining and milling operations.

Every act, operation and use of the appellees complained of in the amended complaint was anticipated and provided against in the Brown indenture, and every injury and damage complained of in the amended complaint was acknowledged by Brown in his indenture to have been paid for, and therein he released appellees and their successors and assigns from all such injury and damage.

If the Brown indenture is not to be interpreted and applied as it was interpreted and applied by the District Court, and the appellant is permitted to recover in this action, then there would exist such a condition as portrayed by the Supreme Court of the United States in Upton, Assignee, v. Tribilcock, 91 U. S. 45, to-wit:

> "If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law."

The Supreme Court of California in Coffey v. Superior Court, 82 Pac. 75, 79, defines "Subject to" as follows:

> "To be 'subject to' is 'to become subservient to' or 'subordinate to,' Cent. Dict."

Webster's New International Dictionary defines "Subject" as follows:

> "To make subservient; to submit (a thing or person) to the action or effect (of something);".

The "thing" Brown made "subject to" and "subservient

to" was all the property involved in this action, and the "something", "action and effect", to which such property was made "subject to" and "subservient to", were the waters of the Coeur d'Alene River in overflowing and depositing on such property the tailings, waste material and debris, produced by the duly authorized and permitted mining and milling operations of appellees, while transporting and carrying away such tailings, waste material and debris.

The claim of appellant that the Brown indenture did not grant and convey to appellees the right and privilege of having the tailings, waste material and debris, resulting from their mining and milling operations, deposited upon the property claimed by appellant, in the course of being transported and carried away by the waters of the Coeur d'Alene River, is conclusively answered by the following holding of the Supreme Court of the United States in Sheets v. Selden's Lessee, II Wallace, 177, 187:

> "The objection that the deed does not cover the premises in controversy rests upon the fact that it does not convey the parcels of land for which the action is brought, by specific designation and description. Such designation and description, though usual, are not always essential. Land will often pass by other terms. Thus a grant of a messuage or a messuage with the appurtenances will carry the dwelling-house and adjoining buildings, and also its orchard, garden, and curtilage. The true rule on the subject is this, that everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance.

Thus the devise of a mill and its appurtenances was held by Mr. Justice Story to pass to the devisee not merely the building but all the land under the mill and necessary for its use, and commonly used with it. So a conveyance 'of a certain tenement, being one-half of a corn-mill situated,' on a designated lot 'with all the privileges and appurtenances' was held by the Supreme Court of New Hampshire to pass not only the mill, but the land on which it was situated, together with such portion of the water privilege as was essential to its use."

In Meir-Nandorf v. Milner, 34 Idaho, 396, 400, the Supreme Court of Idaho said:

"The first rule of construction to be applied to a written instrument in order to determine what is intended by it is that resort shall be had to the language of the instrument itself, and 'If the expressed meaning is plain on the face of the instrument it will control.' (18 C. J., p. 257, sec. 204b, p. 277, sec. 242e.)"

In Kaleialii v. Sullivan, 242 Fed. 446, 449, this Honorable Court, speaking through Circuit Judge Hunt, said:

"The true principle is to construe the deed according to the intention of the parties as manifested by the entire instrument, even though it may not comport with the language of a particular part of it. The recitals in the deed under examination, and which may be useful to aid us in arriving at the intent, are a kind of explanation by the grantor. The first purpose disclosed by them is 'to provide for' the daughters, so as to prevent inconvenience to them, and also to provide the care of their persons with necessary things, and to provide also for their maintenance. The words used in the recitals are not a necessary part of the deed, but being in the instrument, they afford a clue to the intention of the maker. Washburn on Real Property, Sec. 2351."

In Idaho no particular form of words is necessary to constitute a conveyance.

Section 5373 of Idaho Compiled Statutes 1919 is as follows:

> "Section 5373. (3105) Conveyance: How made. A conveyance of an estate in real property may be made by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing. (R. S. Sec. 2920.)"

Section 883 of Devlin on Real Estate, Deeds, Third Edition, Vol. 2, page 1671, is as follows:

> "Sec. 883. How created.---A covenant may be created by any language showing the intention of the parties to bind themselves. No particular form is required, nor is it necessary to use any particular word. A covenant may be created without using the word 'covenant' in the clause containing the stipulation. A covenant may be contained in a recital in the deed, and be as operative as though it was expressed with the other covenants."

In Kelly v. Calhoun, 95 U. S. 710, 713, in which the deed involved was alleged to be defective, the Supreme Court of the United States in affirming the Circuit Court in holding the deed good, had this to say:

> "Instruments like this should be construed, if it can be reasonably done, *ut res magis valeat quam pereat.* It should be the aim of courts, in cases like this, to preserve and not to destroy. Sir Matthew Hale said they should be astute to find means to make acts effectual, according to the honest intent of the parties. Roe v. Tranmar, Willes, 682."

The above Latin maxim is defined in Bouvier's Law Dictionary, as follows:

"That the thing may rather have effect than be destroyed."

The Circuit Court of Appeals for the Sixth Circuit in affirming the decree of the District Court in Peters v. M'Laren, 218 Fed. 410, 421, approved the following language in the opinion of the District Court sustaining a deed and dismissing the petition of appellant:

> "It is the aim of the courts to preserve, not to destroy. They should be astute to find means to make acts effectual, according to the honest intent of the parties. Kelly v. Calhoun, 95 U. S. 710, 713, 24 L. Ed. 544. That construction will always be adopted which will accomplish the object for which the instrument was executed."

In Prescott v. White, 32 Am. Dec. 266, Chief Justice Shaw of the Supreme Judicial Court of Massachusetts, said:

> "When the use of a thing is granted, every thing is granted by which it may be enjoyed: Pomfret v. Riccroft, 1 Wms. Saund. 323, and note 6."

Applying the above text and decisions, including those of the Supreme Court of the United States, of this Honorable Court, of the Supreme Court of Idaho and of numerous other States, it is believed that no other conclusion can be reached than that: when Brown granted and conveyed to appellees the use of the said waters to transport and carry away their tailings, waste material and debris, and made his property subject to and charged the same with such use, he granted and conveyed to them the use of having such waters overflow and deposit on his property such tailings, waste material and debris.

FINAL ANALYSIS OF BROWN INDENTURE

Brown after asserting his ownership and possession of the property described in his indenture, which is the property claimed by the appellant in this action, set forth his claims therein that by the depreciation in value of such property and the loss of crops and in the disease, sickness, loss and death of certain domestic animals, including horses and cattle, he had been in the past and would be in the future damaged by reason of the past and future mining and milling operations in the Counties of Shoshone and Kootenai, State of Idaho, of the appellees, and by reason of the use of the waters of the Coeur d'Alene River and the South Fork of the Coeur d'Alene River and its tributaries in such mining and milling operations and in the dumping of the tailings, waste material and debris from such mining and milling operations into such waters, and by reason of the use of such waters in the said Counties of Shoshone and Kootenai, State of Idaho, in the transportation and carrying away of the said tailings, waste material and debris from such operations.

After enumerating such claims Brown in consideration of the sum of money mentioned in his indenture, which he acknowledged therein as having been paid to him by the appellees, which payment he acknowledged as full payment and satisfaction of all damages to him, including all damages to said property and each and every part thereof and to all crops and for the loss of all crops and by reason of the sickness, disease, loss and death of domestic animals, including horses and cattle, which he had sustained in the past and which he would sustain in the future by reason

of the said mining and milling operations of the appellees and their use of the said waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in said mining and milling operations, and the use of said waters as a dumping ground for the tailings, waste material and debris resulting from such mining and milling operations, and the use of said waters in the said Counties of Shoshone and Kootenai, State of Idaho, in the transportation and carrying away of the tailings, waste material and debris resulting from such operations: granted, bargained, sold, conveyed and confirmed unto the appellees and to their successors and assigns forever, the right and privilege to carry on and continue in the said Counties of Shoshone and Kootenai, State of Idaho, any and all mining and milling operations in which they or any of them may engage in said counties or in either of them, and the right and privilege of dumping any tailings, waste material and debris that may result from such mining and milling operations into the said Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries or along the banks thereof, and the right and privilege of having such tailings, waste material and debris transported and carried away by the said waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries; and by his indenture subjected and charged said property and each and every part thereof with said mining and milling operations of appellees in the past and with the said use of the said waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in said operations and in the said transportation and carrying away of

said tailings, waste material and debris by said waters, and also subjected and charged said property and each and every part thereof with all the mining and milling operations in the future of the appellees, their successors and assigns, and with the privilege of dumping the tailings, waste material and debris that may result from such future mining and milling operations into the said Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries and along the banks thereof, and with the privilege of the use of the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in such future mining and milling operations and for the transportation and carrying away of all said tailings, waste material and debris that may result from all such future mining and milling operations both in the said County of Shoshone and the said County of Kootenai, State of Idaho; and in further consideration of the payment to him of said sum, Brown in his indenture released the appellees and their successors and assigns from all damages and claim of damages in the future on account of any injury or damages to said property and every part thereof, and on account of the loss of and damage to any and all crops upon said property, and on account of the sickness, disease, loss and death of any and all domestic animals on said property, which may be caused by such future mining and milling operations of the appellees and their successors and assigns and by the dumping of such tailings, waste material and debris as may result from said mining and milling operations into the said Coeur d'Alene River, the South Fork of the Coeur d'Alene River

and its tributaries and along the banks thereof, and which may be caused by the use of the said waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in such future mining and milling operations and for the transportation and carrying away of all such tailings, waste material and debris that may result therefrom in the said County of Shoshone and the said County of Kootenai, State of Idaho.

Brown did not stop there but further provided in his indenture that all of the above and foregoing was granted and conveyed and belonged to the appellees and their successors and assigns "Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof."; and further provided for the appellees and their successors and assigns "To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said parties of the second part, (including these appellees) their representatives, successors, heirs, executors, administrators and assigns forever."

Brown not only granted and conveyed to appellees and their successors and assigns the right and privilege of having all tailings, waste material and debris produced in all of their mining and milling operations, both in the past and in the future, transported and carried away by the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries but went farther and made all of his property, described in his written indenture, subject to and charged with such right and

privilege of having all such tailings, waste material and debris transported and carried away by said waters, and even went farther and granted and conveyed such right and privilege together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, to be had and held by appellees and their successors and assigns forever.

That right and privilege to which his property was subjected and with which it was charged included the right and privilege of having all such tailings, waste material and debris deposited upon his lands and property in the course of their being transported and carried away by the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries.

The language of the Brown indenture is so plain, clear, certain and unambiguous as to admit of no other interpretation. Even though he had not charged and subjected his property to such right and privilege of transportation and carrying away and had merely granted such right and privilege of transportation and carrying away together with the appurtenances thereunto belonging to be had and held by the appellees and their successors and assigns forever, no other interpretation could have been placed on such a grant and conveyance than that it granted and conveyed the right and privilege of having such waters transport and carry such tailings upon the property of Brown.

It would destroy the purpose, force and effect of the Brown indenture and amount to an accusal of appellees paying money to Brown for no cause or reason whatever

to limit the right and privilege of transporting and carrying away the tailings, waste material and debris to the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries which flow in the channel between their banks and in which channel none of his property was situate.

The mere grant and conveyance to appellees of the right and privilege of having such tailings, waste material and debris confined to such waters as did not overflow the property of Brown, would be a useless and valueless grant and conveyance.

In Scheel v. Alhambra Min. Co., 79 Fed. 821, in which there was involved a strip of land through which a tunnel ran, but which did not include the land at the mouth of the tunnel necessary for a dump and for use in the running and operating of the tunnel, District Judge Hawley held that the deed, which granted, bargained, sold and conveyed the strip of land "together with all and singular the * * * appurtenances thereto belonging.", included the right to dump waste rock at the mouth of the tunnel on the land owned by the grantors, but which was not included in the strip of land mentioned in the deed, as incident and appurtenant to the tunnel constructed through such strip of land, and in the course of his opinion said:

> "Did the right to use the surface ground at the mouth of the tunnel as a dump pass by the conveyance from the plaintiff to the defendant of the tunnel right as an incident or appurtenant to the land conveyed? The deed was a bargain and sale deed. It granted, bargained, sold, and conveyed the premises described in the statement of facts, 'together with all and singular the * * * ap-

purtenances thereto belonging.' The conveyance of the land through which the tunnel runs would be of but little, if any, value without the use of the surface ground at the mouth thereof as a dump. In fact, the tunnel could not be successfully run for the purposes for which it was located and constructed without such right or privilege. A deed in general terms passes everything which is a constituent part of the land granted. Was the right to dump the waste rock on the plaintiff's land an incident or appurtenant to the use and occupancy of the tunnel? The word 'appurtenances,' in common parlance and legal acceptation, is used to signify something belonging to another thing as principal, and which passes as incident to the principal thing. * * *

By implication the grant of such a right carries with it every incident and appurtenant thereto, including the right to dump the waste rock at the mouth of the tunnel on the land owned by the grantors at the time of the conveyance of the tunnel right, such right or easement being necessary for the full and free enjoyment of the tunnel right."

Unquestionably and incontestably the Brown indenture which granted and conveyed the right and privilege to have the tailings, waste material and debris transported and carried away by the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries and which subjected and charged the property of Brown with such right and privilege, also granted and conveyed the right and privilege of having such waters, in transporting and carrying away such tailings, waste material and debris, deposit the same upon the property involved in this action.

Such was the holding of the District Court and such

holding is supported by the holding of District Judge Dietrich in the Polak case, which included the interpretation of the Brown indenture and the acts of the appellees in securing it and other similar indentures, to-wit:

> "and, as shown by several instruments in evidence, they acted together in securing from the farmers in the valley, releases and easements as against just such a claim as the plaintiff is here asserting."

Every argument, claim and contention, appearing in the brief of appellant, to the effect that the Brown indenture does not grant and convey to appellees the right and privilege of having the tailings, waste material and debris, produced by the appellees in their mining and milling operations, transported, carried away and deposited by the waters of the Coeur d'Alene River upon the property described in such indenture, and which is claimed by the appellant, is answered, denied and disproven by the incontestable record in this action.

That there may be no further dispute upon this proposition let reference be had to the record which sets forth the claim of the appellant as made by him in his amended complaint, and also the Brown indenture which discloses that such claim has been anticipated and provided against in such indenture; that every act and operation upon the part of the appellees, complained of in the amended complaint, has been authorized by such indenture; that every overflow and deposit upon the property, involved in this action, has been permitted by such indenture, and that appellees by such indenture have been discharged and released from all damages, claims of damages, injuries to such property and consequences resulting from the overflow of such

property by the waters of the Coeur d'Alene River and the deposit of tailings, waste material and debris, produced by the mining and milling operations of the appellees, that may have been carried and deposited upon such property by such waters.

The following is the claim of the appellant found in his amended complaint, to-wit:

> "that for many years the defendants have from their said properties, mined and extracted immense quantities of lead, zinc, copper, silver, and other metals, that in order to separate said minerals from the base rock, and earth in which they are found, and for the purpose of said treatment, the defendants have build, maintained, and operated, continuously, mills and concentrators, and in such operations the defendants have run through said mills and concentrators, daily many thousands of tons of said ores, the exact amount, this plaintiff has no means of knowing, and after said minerals were thus extracted these defendants dumped and cast said refuse, consisting of rock, earth, slimes, tailings, debris, and other poisonous substances into the said Coeur d'Alene River and its tributaries, and upon their banks, which deposits by the natural force and action of the waters of said streams, washed and carried into the Coeur d'Alene River, and down said River, to and during flood times, upon plaintiff's said land;". (R. p. 20.)

Thus it will be seen:

(a) That the appellees have conducted mining and milling operations.

(b) That in such operations appellees, after extracting from their ores the minerals therein contained, dumped and cast the refuse, consisting of tailings, debris and other poisonous substances resulting from such

operations, into the Coeur d'Alene River and its tributaries and upon their banks.

(c) That such deposits by the natural force and action of the waters of said streams were washed and carried into the Coeur d'Alene River and down said river to and, during flood times, upon plaintiff's land.

Four things are complained of:

First, the mining and milling operations of appellees.

Second, the separation by such milling operations of the metals from the ores milled by appellees.

Third, the dumping by appellees of tailings, waste material and debris, produced by their milling operations, into the waters of the Coeur d'Alene River and its tributaries.

Fourth, the carrying of such tailings, waste material and debris by the natural force and action of the waters of the Coeur d'Alene River and its tributaries down said Coeur d'Alene River and upon the lands claimed by the appellant.

The Brown indenture grants and conveys to appellees the right and privilege:

(a) To conduct and carry on all such mining and milling operations.

(b) To use the waters of the Coeur d'Alene River and its tributaries in such mining and milling operations.

(c) To dump the tailings, waste material and debris resulting from such mining and milling operations into the waters of said Coeur d'Alene River and its tributaries and along the banks thereof.

(d) To use such waters of such river and its tribu-

taries for the transportation and carrying away of all such tailings, waste material and debris.

Thus it will be seen that the Brown indenture grants and conveys to appellees the right and privilege to do everything complained of.

Furthermore, the Brown indenture makes the property claimed by the appellant subject to and charges it with all of the acts, operations and uses complained of, and releases appellees from all damages, injuries and consequences resulting from such acts, operations and uses.

It is specifically alleged in the amended complaint that it was by the natural force and action of the waters of the Coeur d'Alene River that such tailings, waste material and debris were carried upon the property involved in this action.

By the Brown indenture there is specifically granted and conveyed to appellees the right and privilege to have such tailings, waste material and debris transported and carried away by the said waters of the Coeur d'Alene River and its tributaries without any limitation as to when or where such waters shall transport and carry such tailings, waste material and debris, and such right and privilege in appellees includes the transporting and carrying of such tailings, waste material and debris upon the property claimed by appellant, and that contention is made incontestable by the further terms and provisions of the Brown indenture which subject said property to and charge the same with such transportation and carrying away of such tailings, waste material and debris.

In view of the interpretation by District Judge Dietrich

and this Honorable Court of the Brown indenture, which is the same as the above interpretation thereof, it is quite possible that too much space has been given in this brief in support of appellees' interpretation of and claim for the Brown indenture, and without repeating the interpretation of District Judge Dietrich and of this Honorable Court they content themselves with presenting a like interpretation by District Judge Cavanah, to-wit:

> "But the plaintiff urges that as the agreement merely grants a license and not a release and easement and the terms thereof do not run with the land, it does not bar him from recovering the damages alleged in the amended complaint. The answer to this contention requires an interpretation of the agreement, which was given by the court at the close of the argument on the motion, but, as it is further urged by plaintiff in his brief, I have given the question further consideration, and from the express language of the instrument it is found that Brown, the predecessor in interest of plaintiff in the land, released the defendants Bunker Hill, Federal and Hecla Companies from all past and future claims for damages for injury to the lands and crops such as are here asserted resulting from the mining operations of such defendants, as it is there clearly recited that the property is made subject to and charged with the mining and milling operations of the defendants in the past and future, when in dumping into and using the waters of the river and the creek for tailings and waste material. Reading the instrument as a whole it will be observed that it clearly conveys the idea and intention of the parties that it grants to the defendants Bunker Hill, Federal and Hecla Companies a release and an easement against just such a claim as the plaintiff is

here asserting, and are covenants running with the land. The same construction was given by the court in receiving in evidence this agreement and others in the case of Polak against these three defendants, and others, and the court there held, referring to these three defendants, that "The two dams referred to here are joint enterprises, and, as shown by several instruments in evidence, they acted together in securing from farmers in the valley, releases and easements as against such a claim as plaintiff is here asserting.' Polak v. Bunker Hill & Sullivan Mining & Concentrating Co., et al. (Decided August 9, 1924). The Polak case went to the Circuit Court of Appeals, and the interpretation there placed upon the instruments was that the companies had 'secured releases from farmers for damages resulting from their mining operations.' Polak v. Bunker Hill & Sullivan Mining & Concentrating Company, 7 F. (2) 583." (R. p. 70.)

After the execution of his indenture Brown held only the servient estate in his property and the appellees held the dominant estate therein, and appellant has no greater estate in such property than the servient estate therein, once held by Brown, and which servient estate is subject to the dominant estate of appellees.

The complaint of the appellant is that the natural force and action of the waters of the Coeur d'Alene River carried upon his lands the tailings, waste material and debris produced by the appellees in their mining and milling operations.

Brown in his indenture granted and conveyed to appellees and their successors and assigns forever the right and privilege of having the waters of the Coeur d'Alene River

carry away such tailings, waste material and debris, and, to eliminate every doubt, question and controversy as to the purpose, force and effect of his conveyance, he made such lands subject to and charged the same with such carrying of such tailings, waste material and debris.

If Brown could not grant and convey such right and privilege of carrying away such tailings, waste material and debris by the waters of the Coeur d'Alene River, and make his lands subject to and charge the same with such carrying away, then Brown could not have maintained any action against these appellees on account of the carrying of such tailings, waste material and debris by the waters of the Coeur d'Alene River upon his lands.

Whatever right, title or interest the appellant has in the property involved in this action, he claims the same through Brown, therefore, he has no better right, title or interest in such lands than Brown had after the execution of his indenture to appellees.

A could not maintain a cause of action against B which he could not waive, or from which he could not release or discharge B.

In the opinion of this Court in McCarthy v. Bunker Hill & Sullivan Mining & C. Co., 164 Fed. 927, 939, Circuit Judge Ross said:

> "In all of the mining states the right to the reasonable use of the public streams for mining purposes is given by usage, custom and law, and by section 3 of article 15 of the Constitution of the state of Idaho, where the properties here in question are situate, miners are given the preferred right to the use of waters of the

streams of that state over, among others, manufacturers and agriculturists."

Any patent that may have issued from the United States for the lands involved in this action contains the following reservation:

"To have and to hold the said tract of land, with the appurtenances thereof, unto the said..... and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws and decisions of the courts."

Such reservation in such patent from the United States had its inception in an act of Congress, dated July 26, 1866, sections 2339 and 2340 of the Revised Statutes of the United States.

In the case of Broder v. Water Co., 101 U. S. 274, the Supreme Court of the United States interpreted that statute and affirmed the judgment of the Supreme Court of California dismissing an action brought against a water and mining company to have its canal declared a nuisance and abated, and to recover $12,000 damages on account of its maintenance on plaintiff's land.

In its opinion the Supreme Court said:

"As the plaintiff's right to the lands patented to him and his brother commenced subsequently to this statute, he took the title subject to this right of way, and cannot now disturb it. * * *

It is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons

who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary *recognition of a preexisting right of possession*, constituting a valid claim to its continued use, than the establishment of a new one. * * *

The defendant had been in possession of the claim in question for twelve years when this act was passed, and had expended $200,000 upon it. It was of great utility, nay necessity, to a large agricultural and mining interest, and we cannot doubt that it was of the class which this section declared should not be defeated by the grant which Congress was then making.

As the judgment of the Supreme Court of California was based on this principle, it is

Affirmed."

In Atchison v. Peterson, 20 Wall. 507, 510, the Supreme Court of the United States, in its opinion affirming the decree of the Supreme Court of Montana denying an injunction against a subsequent appropriator for mining purposes from discharging mining tailings into a stream which caused such tailings to be carried into the ditch of a prior appropriator, said:

"By the custom which has obtained among miners in the Pacific States and Territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on

such lands for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relative to the property. As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day, after the discovery of gold, found to be inapplicable or applicable only in a very limited extent to the necessities of miners, and inadequate to their protection." * * *

"This doctrine of right by prior appropriation, was recognized by the legislation of Congress in 1866."

After quoting the following language of the Supreme Court of California in Jacob v. Day, 44 Pac. 243, 245, to-wit:

"Every use of water for purposes of hydraulic mining, sanctioned by local custom and law, is recognized as a right and protected as such.",

Mr. Lindley in his work on Mines, Third Edition, Vol. 3, Sec. 841, page 2069, said:

"What is here said applies with equal force to general mining and milling operations. The tailings from an ordinary quartz-mill, when discharged into the running streams, have no greater tendency to deteriorate the quality of the water than the material washed from the natural banks. As a physical impediment they are comparatively harmless. They are fine particles of sand artificially produced, but of the same character as that washed into the streams from the rocks eroded by processes of nature which are universal. While the privilege of depositing such tailings in the streams must be rea-

sonably exercised, and so as not to materially impair or destroy rights acquired by a lawful prior appropriator, yet to say that the discharge of such tailings is a nuisance per se, or to restrict it within unreasonable limits, is to interdict the prosecution of a lawful enterprise and practically to confiscate property of inconceivable value. Should any such stringent rule be invoked in regard to either quartz or hydraulic mining, the industry would be abandoned, awaiting the advent of the magician who will separate gold and silver from the earth and rocks without the aid of water."

That right to use the waters of public streams for mining and milling purposes has been held by the courts and declared by statute and constitution to be a property right.

Brown claimed that his property had depreciated in value and been damaged as the result of the exercise by appellees of that property right.

To relieve themselves from such claim appellees paid for and secured a grant and conveyance from Brown to them of the right and privilege to use the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries for the transportation and carrying away of the tailings, waste material and debris produced in the employment of such property right; and Brown went farther and charged his property with and made it subject to such use by the appellees, which included the right and privilege of having the waters of the Coeur d'Alene River transport and carry such tailings, waste material and debris upon his property.

The contention that Brown could not and did not grant and convey to appellees every right which he had to question, oppose or object to the right and privilege of the

appellees to exercise and enjoy their property right to use the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in their mining and milling operations and for the transportation and carrying away of all the tailings, waste material and debris produced in their mining and milling operations, and could not and did not by his indenture make his property subject to and charge the same with such use, which included the transportation and carrying by such waters of such tailings, waste material and debris down to and upon his property, is wholly without reason or merit.

If Brown could not grant and convey the right and privilege to appellees to use that property right, and could not make his property subject to and charge the same with the right and privilege in the appellees to exercise that property right, and thereby relieve appellees from every claim of right on his part and upon the part of his assigns, (so far as concerned the property claimed by appellant,) to object to the exercise and enjoyment of such property right, then Brown could not have any cause of action against the appellees on account of the depreciation in value of or damage to his property as the result of the employment by the appellees of that property right, nor could appellant have any cause of action against appellees by reason of the depreciation in value of and damage to the same property resulting from the exercise by the appellees of that property right.

However, Brown could and did grant and convey to appellees the right and privilege to exercise and enjoy that

property right, and he could and did subject his property to and charge the same with the right and privilege in appellees to exercise and enjoy that property right, and appellant and the property claimed by him are bound by such grant, conveyance, subjection and charge, and appellant had no right to maintain this action against appellees in the District Court, and these appellees respectfully urge that the judgment of dismissal rendered by the District Court be affirmed.

Respectfully submitted,

C. W. BEALE,

Attorney for Appellees.

Residence and Post Office Address,

Wallace, Idaho.

Service of the above and foregoing brief admitted, accepted and received and two true copies of said brief received and accepted this ..... day of May, A. D. 1930.

.....

.....

Attorneys for Appellant.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

BANK OF ITALY NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Appellant,

vs.

THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED, a national banking association, and HENRY P. HILLIARD, as Receiver thereof,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

BANK OF ITALY NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Appellant,

vs.

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Names and Addresses of Attorneys.

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For Appellee:

HARTLEY F. PEART, Esq.,

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GALLAHER & JERTBERG, Esqs.,

Fresno, California.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

BANK OF ITALY NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, Plaintiff, vs. THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED, a national banking association, and HENRY P. HILLIARD, as Receiver thereof, Defendants.	)	No. 357-J. Civil. CITATION ON APPEAL.

United States of America,)
) ss.
Southern District of California.)

To THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED, a national banking association, and HENRY P. HILLIARD, as Receiver thereof, Defendants above named, and to HARTLEY F. PEART and GALLAHER & JERTBERG, their Attorneys, GREETINGS:

YOU ARE HEREBY CITED and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the CITY OF SAN FRANCISCO, in the State of California, on the 8th day of March, 1930, pursuant to an Appeal filed in the Clerk's office of the District Court of the United States, in and for the Southern District of California, in that certain

action numbered 357-J Civil, wherein BANK OF ITALY NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, is appellant, and you are respondents to show cause, if any there be, why the judgment given, made and entered against the said THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED, a national banking association, and HENRY P. HILLIARD, as Receiver thereof, in the said Appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Paul J. McCormick United States District Judge for the Southern District of California, this 7th day of February, A. D. 1930 and of the Independence of the United States, the One Hundred and fifty-fourth.

Paul J. McCormick
United States District Judge for the Southern District of California

Service of the within citation on appeal and receipt of copy admitted February 10th 1930

Hartley F. Peart
Gallaher & Jertberg,
Attorneys for Defendants and Appellees.

Receipt of copy of Bond on Appeal, copy of Assignment of Errors, copy of Petition on Appeal and Stipulation and order re printing of Transcript admitted February 10th, 1930.

Hartley F. Peart
Gallaher & Jertberg
Attorneys for defendants and appellees.

[Endorsed]: Filed Feb. 12, 1930. R. S. Zimmerman Clerk By M. L. Gaines Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF MERCED.

----o0o----

BANK OF ITALY NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Plaintiff,

vs.

No. 7178.

COMPLAINT.

THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED, a national banking association, and HENRY P. HILLIARD, as Receiver thereof,

Defendants.

------o0o------

For cause of action against defendants plaintiff alleges:

I.

That plaintiff is now, and ever since March 1, 1927 has been a national banking association duly organized and existing under and by virtue of the laws of the United States of America, with its principal place of business in the City and County of San Francisco, State of California, and with a branch place of business in the City of Merced, County of Merced, State of California.

II.

That Merced Security Savings Bank is now, and was at all times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City of Merced, County of Merced, State of California.

III.

That defendant The Farmers and Merchants National Bank of Merced is now and was at all times herein mentioned a national banking association duly organized and existing under and by virtue of the laws of the United States of America, with its principal place of business in the City of Merced, County of Merced, State of California; that said defendant bank is now and has been since on or about September 20, 1926 in liquidation; that on or about October 1, 1926 defendant Henry P. Hilliard was by the Comptroller of the Currency of the United States of America duly appointed receiver of said The Farmers and Merchants National Bank of Merced; that he thereupon duly qualified and has ever since been and now is the duly appointed, qualified and acting receiver of said bank.

IV.

That on or about the 31st day of December, 1925 said Merced Security Savings Bank was the owner of, in possession of, and entitled to the possession of certain negotiable bonds hereinafter mentioned and described; that at all times in this paragraph 4 mentioned one J. B. Hart was the duly elected, qualified and acting Treasurer of the City of Merced, a municipal corporation, and at all of said times said J. B. Hart was also the president and manager of said The Farmers and Merchants National Bank of Merced; that on or about said 31st day of December, 1925 in accordance with and pursuant to that certain statute of the State of California entitled, "An Act to Authorize and Control the Deposit in Banks of Money Belonging to or in the Custody of any County or Municipality within this State, and to Repeal all Acts or

Parts of Acts in Conflict with this Act," approved April 12, 1923, and known and designated as Chapter 17 of the Statutes of California of 1923, pages 25 to 29 inclusive, said Merced Security Savings Bank deposited with said J. B. Hart as Treasurer of said City of Merced said negotiable bonds as security for a certain deposit of $25,000.00 of public moneys belonging to said City of Merced then in the custody and control of said J. B. Hart as such Treasurer, and thereupon said Merced Security Savings Bank received from said J. B. Hart as such Treasurer the said amount of $25,000.00 of public moneys as such deposit.

That at some time or times between December 31, 1925 and September 20, 1926 and without the consent or knowledge of said Merced Security Savings Bank and without the consent or knowledge of said City of Merced, the said J. B. Hart delivered the possession of said negotiable bonds to said The Farmers and Merchants National Bank of Merced; that on or about the 13th day of May, 1926 said The Farmers and Merchants National Bank of Merced sold and converted the said negotiable bonds to its own use and benefit without the knowledge or consent of said Merced Security Savings Bank or of said City of Merced and appropriated the proceeds thereof to its own use and to the damage of said Merced Security Savings Bank in the sum of $28,000.00; that said sale and conversion of said negotiable bonds as aforesaid was not made in connection with said deposit of public moneys and was not dependent upon or connected therewith in any way whatever; that said sale so made as aforesaid was made by said The Farmers and Merchants National Bank of Merced to a holder in due course.

V.

That following is a description of the bonds hereinbefore mentioned:

Number	Description	Face Value
27-28	Santa Monica Storm Drainage Bonds	$1000.00
22-27-28-29	Santa Monica Fire Apparatus Bonds	2000.
27-28-29-30	Santa Monica Bridge Imp. Bonds	2000.
27-28-29-30	Santa Monica Sewer Bonds	4000.
	37 Turlock Irrigation District Bonds of $400. each	14800.
	268-269-270-271-272-274-277-280-1020-1021-1022-1023-2058-2057-2059-2279-2280-2281-2282-2283-2498-2499-2500-2501-2502-2503-2504-2505-2506-2507-2508-2509-2510-2511-2512-2513 and 2514	
8625	City of Los Angeles Electric P.	1000.
796-781 and 751	City of Los Angeles Water Works Bonds at $1000.	3000.

VI.

That at all times in this complaint mentioned said negotiable bonds were and now are of the market value of $28,000.

VII.

That said Merced Security Savings Bank did not discover and had no knowledge of said conversion or of said sale of said bonds until subsequent to the 20th day of Sep-

tember, 1926 at which time said The Farmers and Merchants National Bank of Merced went into liquidation.

VIII.

That subsequent to said 20th day of September, 1926 and prior to February 21, 1927, said Merced Security Savings Bank made proof of its claim herein arising out of the facts hereinbefore alleged for damages in the sum of $28,000. for the said conversion of said bonds, which said proof of claim was in writing and duly verified by the Cashier of said Merced Security Savings Bank, and presented said claim to said defendants and each of them for allowance; that on or about the 21st day of February, 1927 the said defendants and each of them rejected said claim and have and each of them has refused ever since said time and at the present time to allow the said claim or any part thereof or to pay anything thereon; that no part thereof has been paid.

IX.

That prior to the commencement of this action Merced Security Savings Bank transferred and assigned to plaintiff all of its right, title and interest in and to said bonds and to the claim, demand and cause of action herein arising out of the said conversion of said bonds as aforesaid, and plaintiff is now the owner and holder of said claim, demand, cause of action and all rights against said defendants and each of them arising out of said conversion so as aforesaid and the said rejection of said claim as aforesaid.

X.

That prior to the commencement of this action said deposit of $25000. so made as aforesaid with all interest due thereon was fully paid and delivered to said City of Merced.

WHEREFORE, plaintiff prays that this court by its judgment establish said claim for conversion of said bonds as a valid claim against said defendants and direct said Receiver to certify the same as a valid claim against defendants to Comptroller of the Currency of the United States to be paid by him in the due course of the liquidation of said bank, together with interest on said $28,000.00 at the rate of seven per cent. per annum from date of conversion, and for its costs of suit herein and for such other and further relief as may seem meet in the premises.

J. J. Posner
Louis *D'enari* and
F. W. Henderson
Attorneys for plaintiff.

STATE OF CALIFORNIA. :
CITY AND COUNTY OF : ss.
SAN FRANCISCO. :

A. PEDRINI, being first duly sworn, deposes and says: That he is Vice President of the plaintiff corporation named in the above entitled action and as such makes this affidavit for and on behalf of said corporation; that he has read the within and foregoing complaint and knows the contents thereof; that the *said* is true of his own knowledge, except as to the matters therein stated upon information and belief and as to those matters that he believes it to be true.

A. PEDRINI

Subscribed and sworn to before me this 12th day of September, 1927

[Seal] Virginia A. Beedi
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed this 14 day of Sept. 1927. P. J. Thornton, County Clerk, by Neta M. Porter, Deputy.

[TITLE OF COURT AND CAUSE.]

No. 7178

PETITION FOR REMOVAL

TO THE HONORABLE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF MERCED:

Your petitioner, one of the defendants above named, Henry P. Hilliard, Receiver of The Farmers and Merchants National Bank of Merced, a corporation, on his own behalf, as Receiver of said bank and on behalf of the other defendant, the said The Farmers and Merchants National Bank of Merced, a corporation, respectfully shows to this honorable Court:

That the above entitled action was heretofore brought by the above named Plaintiff in the above entitled action; that summons was issued herein and was served with a copy of the complaint filed herein upon the defendant, The Farmers and Merchants National Bank of Merced, a corporation, on the 16th day of September, 1927, in the County of Merced, State of California, by serving said papers upon one W. E. Landram, a former vice president of said bank; that your petitioner as Receiver of said bank, although summons has been issued, has not been served with summons or copy of the complaint, and that the time has not elapsed within which your petitioner or said bank is allowed, under the practice and laws of the State of California to plead, demur, answer, or otherwise move in said action.

That The Farmers and Merchants National Bank of Merced is, and at all times in said complaint mentioned has been, a banking corporation, duly organized and ex-

isting under and by virtue of the laws of the United States of America, and having its banking house and principal place of business in the City of Merced, County of Merced, State of California; that said bank prior to the 23rd day of September, 1926, became and was insolvent, and ever since said date has been and now is, insolvent.

That on the 23rd day of September, 1926, your petitioner herein, Henry P. Hilliard, was by the Comptroller of the Currency of the United States of America, duly and regularly appointed Receiver of said bank and duly qualified and entered upon the duties of said receivership of said bank, and ever since has been and now is the duly appointed, qualified and acting Receiver of said Bank.

Your petitioner further shows that the above entitled action is of a civil nature, and was brought by said plaintiff to establish an alleged claim for the alleged conversion by said bank of certain bonds alleged to be of the value of $28,000 as a valid claim against said defendants and to direct your petitioner to certify the same as a valid claim against the defendants to the Comptroller of the Currency of the United States to be paid by him in the due course of the liquidation of said bank, together with interest on said $28,000 at the rate of 7% per annum from the date of the alleged conversion; that your petitioner and said bank deny said claim and dispute the same, and that the matter in dispute in said action exceeds the sum of $3,000, exclusive of interest and costs; that your petitioner offers and files herein his bond with good and sufficient security as required by the Act of Congress, that he will enter in the District Court of the United States in and for the Southern District of California, Northern Division, within thirty (30) days from the filing of this peti-

tion for removal, a certified copy of the record in said action, and for the payment of all costs that may be awarded by said District Court if such District Court shall hold that said suit was wrongfully or improperly removed thereto.

Your petitioner further prays that this petition and said bond may be accepted by this court and that said suit may be removed into the District Court of the United States in and for the Southern District of California, Northern Division, pursuant to the aforesaid statute in such case made and provided, and that a transcript of the record herein be directed to be made up as provided by law, and that no further proceedings be had herein in this court, and for such other and further relief as may be proper

HENRY P. HILLIARD
Petitioner.

HARTLEY F. PEART
GALLAHER & JERTBERG
Attorneys for Petitioner.

STATE OF CALIFORNIA)
COUNTY OF MERCED) SS.

HENRY P. HILLIARD, being first duly sworn, deposes and says: That he is the Receiver of The Farmers and Merchants National Bank, a corporation, and petitioner in the foregoing petition; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true.

HENRY P. HILLIARD

Subscribed and sworn to before me this 17th day of September 1927.

[Seal] H. S. SHAFFER

Notary Public in and for said County and State.

[Endorsed]: Filed this 26 day of Sept. 1927. P. J. Thornton, County Clerk, by Neta M. Porter, Deputy.

[TITLE OF COURT AND CAUSE.]

No. 7178

ORDER FOR REMOVAL OF CAUSE TO UNITED STATES DISTRICT COURT.

It appearing that the defendant HENRY P. HILLIARD, Receiver of The Farmers and Merchants National Bank of Merced, a corporation, in the above entitled action has filed his petition for the removal of this cause to the United States District Court in and for the Southern District of California, Northern Division, in accordance with the law therefor provided, and said Defendant having filed his bond duly conditioned, with good and sufficient surety as provided by law, and it appearing to the court that this is a proper case for removal to said District Court,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that said petition and bond be and the same are hereby accepted and approved, and that this cause be, and it is hereby removed to the United States District Court in and for the Southern District of California, Northern Division thereof; and the Clerk is hereby directed to make a copy of the record in said cause duly certified for trans-

mission to said District Court forthwith, and that no further proceedings be taken in this court.

DONE in Open Court this 26th day of September, 1927.

L. W. FULKERTH
Judge of said Superior Court.

[Endorsed]: Filed this 26 day of Sept. 1927. P. J. Thornton, County Clerk, by Neta M. Porter, Deputy.

[Endorsed]: Case No. 357. Filed Oct. 25, 1927. R. S. Zimmerman, R. S. Zimmerman, Clerk.

[Title of Court and Cause.]

No. 357-J. CIVIL

ANSWER

Come now the defendants and for answer to the complaint of the plaintiff herein admit, deny and allege:

I.

The defendants deny that on or about the 31st day of December, 1925, the Merced Security Savings Bank deposited with J. B. Hart as Treasurer of the City of Merced, the bonds described in paragraph 5 of plaintiff's complaint herein, and in this connection defendants allege that they are informed and believe, and upon such information and belief allege the fact to be that on or about said 31st day of December, 1925, the said Merced Security Savings Bank deposited with the said J. B. Hart as Treasurer of said City of Merced certain Municipal bonds, the par value of which said bonds was the sum of $28,000.00.

Defendants deny that at sometime between December 31, 1925 and September 20, 1926, or at any other time

the said J. B. Hart delivered the possession of said negotiable bonds to The Farmers and Merchants National Bank of Merced, and deny that on or about the 13th day of May, 1926, or at any other time, The Farmers and Merchants National Bank of Merced sold the said negotiable bonds or converted said negotiable bonds to its own use and benefit or to its own use or benefit, or at all, and deny that the said Merced Security Savings Bank was damaged in the sum of $28,000.00, or in any sum whatsoever; and deny that said sale was made, or any sale made in any manner of said or any bonds by The Farmers and Merchants National Bank of Merced.

Defendants allege that they have not sufficient information or belief upon the subject to enable them to answer that portion of paragraph 4 of the plaintiff's complaint herein which alleges that "said sale so made as aforesaid was made by said The Farmers and Merchants National Bank of Merced to a holder in due course," and placing their denial upon that ground deny that said or any sale was made by said The Farmers and Merchants National Bank, and placing their denial upon that ground deny that any sale of said bonds was made to a holder in due course. and defendants are informed and believe. and upon such information and belief allege the fact to be, that bonds in the possession of the said J. B. Hart as Treasurer of the said City of Merced and being then and there the property of the said Merced Security Savings Bank, were transferred by said J. B. Hart to a holder, but defendants are informed and believe, and upon such information and belief allege the fact to be, that said transfer was not a sale thereof and was not to a holder in due course.

II.

Answering paragraph 5 of the plaintiff's complaint herein, defendants deny that the bonds described in said paragraph 5 of said complaint are or were the same bonds delivered by the said Merced Security Savings Bank to the said J. B. Hart as Treasurer of the City of Merced on or about the 31st day of December, 1925, and in this connection defendants are informed and believe, and upon such information and belief allege the fact to be that said bonds delivered by said Merced Security Savings Bank to said J. B. Hart as Treasurer of the City of Merced on or about the 31st day of December, 1925, were by said J. B. Hart thereafter and prior to the 12th day of May, 1926, transferred to the possession of another, and that on or about the 12th day of May, 1926, the said J. B. Hart as Treasurer of the said City of Merced recovered the possession of said bonds and re-delivered said bonds to the said Merced Security Savings Bank.

III.

Answering paragraph 9 of plaintiff's complaint herein, defendants allege that they have not sufficient information or belief upon the subject to answer the allegations of said paragraph 9 of said complaint, and placing their denial upon that ground deny that prior to the commencement of this action, or at all, Merced Security Savings Bank transferred and assigned to plaintiff herein all of its rights, title and interest in and to said bonds and to the claim, demand and cause of action herein arising out of the said conversion of said bonds as aforesaid, and upon the same ground deny that the said Merced Security Savings Bank at any time transferred or assigned to plaintiff all of its rights, or any of its rights, or all of its title,

or any of its title, or all of its interest, or any of its interest in and to, or in or to, said bonds, or to any claim or demand or cause of action arising out of any conversion of said bonds, and placing their denial upon the same ground defendants deny that the plaintiff is now the owner and holder of said claim, demand, cause of action, and all rights against said defendants and each of them arising out of said conversion, or arising out of any conversion, and deny that the plaintiff is now the owner or the holder of said or any claim against the defendants, or against either of them, and deny that the plaintiff is the owner or holder of any cause of action, or any right or rights against said defendants or against either of them.

IV.

Answering paragraph 10 of plaintiff's complaint herein, defendants have not sufficient information or belief upon the subject to enable them to answer the allegation in said paragraph 10 of said complaint, and placing their denial upon that ground deny that prior to the commencement of this action, or at all, said deposit of $25,000.00 or any other amount, was paid and delivered to said City of Merced, or paid or delivered to said City of Merced, and in this connection defendants allege that they are informed and believe, and upon such information and belief allege the fact to be, that prior to the commencement of the above entitled action the said Merced Security Savings Bank and the plaintiff herein settled and adjusted any and all claims arising out of the transaction concerning said bonds mentioned in the complaint herein with the sureties of the said J. B. Hart as City Treasurer of the City of Merced, and defendants are informed and believe, and upon such information and belief allege the fact to be, that a surety

company, the name of which is unknown to the defendants herein, fully paid and discharged all of the obligations of the said J. B. Hart as City Treasurer of the City of Merced and of said surety company as his surety as such public officer to the said Merced Security Savings Bank and to the plaintiff herein, and that the said Merced Security and Savings Bank and the said plaintiff herein then, at the time of said settlement and prior to the commencement of this action, received from the said surety company, whose name is unknown to these defendants, full pay and compensation for any and all losses sustained by them, or by either of them, by reason of any and all transactions of the said J. B. Hart as Treasurer of the said City of Merced, or in any manner whatsoever in connection with any and all of the bonds mentioned in the complaint herein and received by the said J. B. Hart as Treasurer of the City of Merced as security for deposits made of moneys belonging to the said City of Merced in the said Merced Security Savings Bank.

Hartley F. Peart
Gallaher & Jertberg
Attorneys for Defendants.

STATE OF CALIFORNIA)
City and) SS.
COUNTY OF San Francisco.)

HENRY P. HILLIARD, as Receiver of The Farmers and Merchants National Bank of Merced, being first duly sworn, deposes and says: My name is Henry P. Hilliard; I am the Receiver of The Farmers and Merchants National Bank of Merced, and one of the defendants in the above entitled action; I have read the foregoing Answer

and know the contents thereof and the same is true of my own knowledge except as to the matters which are therein stated on information or belief and as to those matters I believe it to be true.

Henry P. Hilliard

Subscribed and sworn to before me this 12th day of November 1927.

[Seal] W. W. Healey

NOTARY PUBLIC in and for the County of SAN FRANCISCO, State of California.

Due and legal service of the within Answer and receipt of a copy thereof is hereby admitted this 14th day of November 1927.

Louis Ferrari and
F. W. Henderson
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 14, 1927 R. S. Zimmerman, Clerk, By Louis J. Somers, Deputy Clerk.

[Title of Court and Cause.]

No. 357-J. Civil.

STIPULATION WAIVING JURY.

IT IS HEREBY STIPULATED that a jury be and the same is hereby waived in the above entitled action and that the said case shall be tried by said Court without a jury.

IT IS UNDERSTOOD that this stipulation waiving a jury is not intended as a waiver of either of the parties

hereto with reference to their rights involved in the matter of the motion to remand said case for trial to the Superior Court of the County of Merced, State of California.

Dated, October 24, 1928.

Louis Ferrari and
F. W. Henderson,
Attorneys for Plaintiff.
Hartley F. Peart
Gallaher & Jertberg
Attorneys for Defendants.

[Endorsed]: Filed October 24, 1928. R. S. Zimmerman, Clerk By Louis J. Somers, Deputy.

[Title of Court and Cause.]

No. 357-J. Civil.

MOTION FOR JUDGMENT.

Now comes plaintiff in the above entitled matter and moves the Court that judgment in said action be entered in favor of plaintiff and against defendants for the sum of $28,000. and for its costs of suit herein, and that said Court adjudge and decree that the claim of said plaintiff against defendants is a valid claim and direct that said Receiver certify the same as a valid claim against defendants to the Comptroller of Currency of the United States, to be paid by him in the due course of the liquidation of said Bank, together with its costs of suit herein incurred.

Louis Ferrari,
J. J. Posner
F. W. Henderson
Attorneys for Plaintiff.

STIPULATION.

IT IS HEREBY STIPULATED between the attorneys for the respective parties to the above entitled action that the foregoing motion be deemed to have been made by plaintiff in said action and that the said motion be considered by said Court as made therein and that if said motion be denied and judgment be rendered in favor of defendants and against plaintiff, that plaintiff have an exception to the judgment and decision of said Court.

Louis Ferrari
J. J. Posner
F. W. Henderson
Attorneys for Plaintiff.

Hartley F. Peart
Gallaher & Jertberg
Attorneys for Defendants.

It is so Ordered pursuant to foregoing stipulation.
Dated Feb. 18th, 1929,

Paul J. McCormick
Judge of said Court.

[Endorsed]: Filed Feb. 18, 1929. R. S. Zimmerman, Clerk By M. L. Gaines, Deputy Clerk.

[Title of Court and Cause.]

CIVIL NO. 357-J

LOUIS FERRARI, Esq. and J. J. POSNER, Esq. of San Francisco, Calif., and F. W. HENDERSON, Esq., of Merced, Calif., attorneys for Plaintiff.

HARTLEY F. PEART, Esq., and Gallaher & Jertberg, of Fresno, Calif. for Defendants.

MEMORANDUM OF DECISION ON MERITS.

This is an action for conversion of personal property by plaintiff as assignee of Merced Security Savings Bank

(herein called Savings Bank) against Farmers and Merchants National Bank of Merced (herein called National Bank), and Henry P. Hilliard as Receiver thereof. The suit was originally filed in the State Court of California, but was removed here by the National Bank's Receiver.

The Savings Bank in order to obtain a deposit of $25,000.00 of the funds of the city of Merced, a municipal corporation of California, from one J. B. Hart, the City Treasurer, deposited with Hart, as City Treasurer, certain of its negotiable municipal bonds of the value of approximately $28,000.00. These securities were required by the laws of California to be deposited in order that the Savings Bank could receive the deposit of the city's funds (California Statutes, 1923, Pages 25-28. Upon delivery of the bonds to him, Hart, as Treasurer, deposited $25,000.00 of the city's money in the Savings Bank. At the time of the deposit of the bonds of the Savings Bank, Hart was also President and active Manager of the National Bank and transacted the business of the two offices in the same premises, using the premises and facilities of the National Bank as a depositary of city monies and securities. The complaint alleges that between Dec. 31, 1925, the date of the deposit and placing of the securities of the Savings Bank with Hart, as City Treasurer, and September 20, 1926, Hart delivered the possession of said bonds to the National Bank, and that on May 13, 1926, the National Bank sold and converted said bonds of the Savings Bank or of the city of Merced and appropriated the proceeds thereof to its own use to the damage of the Savings Bank in the sum of $28,000.00. Judgment is asked against defendants for that amount of money and interest from date of conversion. It is alleged that the

sale and conversion of said bonds was not made in connection with said deposit of public funds and was not dependent upon or connected therewith in any way whatever. This latter allegation is uncontroverted and stands in the record as admitted. The complaint further averrs that the conversion was unknown to the Savings Bank or to its successor, plaintiff herein, and was not discovered until subsequent to November 20, 1926, at which time the National Bank went into liquidation and the defendant Receiver was named by the Comptroller. The customary allegations of demand and refusal to deliver together with the usual averment of presentation of claim to the Receiver and rejection thereof by him appear in the complaint as do also the ordinary allegations of assignment of the claim sued on to plaintiff herein. The misappropriation of the bonds placed with Hart to obtain the deposit of city money in the Savings Bank was an incident in a series of defalcations of Hart as City Treasurer of Merced that culminated in his suicide shortly after discovery of his irregularities.

The answer of defendants denies the allegations of conversion by the National Bank and generally denies all of the other essential allegations of the complaint including a denial that defendant National Bank at any time received, acquired title to, or converted any of said deposited bonds of the *Saving* Bank. It is claimed that Hart as agent of the National Bank never received or converted the bonds, but that his wrongdoing was personal or as City Treasurer and not imputable to the National Bank. The answer sets up a further defense that there has been a compromise, settlement, and discharge of the claim of plaintiff and its assignor by reason of the alleged conver-

sion of the bonds of the Savings Bank and that the claim of plaintiff and its assignor has been fully satisfied and paid by reason of certain transactions between the Surety on the official bond of Hart as City Treasurer, the City of Merced, a municipal corporation and the plaintiff.

It is unnecessary to review in detail the evidence. It is complicated and involved. It is sufficient to state that it establishes the right of the plaintiff to recover under the issues raised by the complaint and answer.

The correspondence of Hart as the National Bank President as well as the books and records of the National Bank and specifically the entries therein concerning the bonds alleged to have been converted, clearly show that Hart was the agent of defendant National Bank in dealing with the securities in suit and that the conversion of the bonds of the Savings Bank admittedly made by Hart is chargeable to the National Bank as his principal. These records represent that the National Bank was the owner of the securities. The city could not be held chargeable for Hart's keeping, management and disposal of the bonds under the applicable California statutes (Sec. 8 Cal. Stat. 1923, P-25) It is contended that the National Bank should not be held accountable for the conversion and loss of the securities of the Savings Bank because the evidence fails to show that the National Bank profited by the irregularities and dishonesty of Hart in converting these securities. I cannot agree with this contention. The record is clear that the assets of the National Bank were preserved and enhanced by its president's transactions concerning these bonds with the First National Bank in Fresno. The transactions were apparently regular and within the apparent lawful and customary duties of an officer of a National

Bank and inured to the benefit of the National Bank. See Campbell vs. Mfg. Nat. Bank, 91 Am. State Rep. 438, First Nat. Bank v. Town of Millford, 36 Conn. 93. Bennett v. Judson, 21 N. Y., 238. U. S. v. Pan Am. Pet. Co., 24 Fed. 2nd, 209. It is also clear that the Savings Bank sustained detriment and money damage because of the conversion. It has lost its bonds. Its damage is the market value of them. Under such circumstances the responsibility of the National Bank and the right of *recover* in the Savings Bank is clear.

The defendant has cited many cases, of which School Dist. of City of Sedalia, Mo. v. DeWeese, 100 Fed. 705 is typical. I do not regard these authorities as in point here. In all of them, it appeared and was so held that the agent of the bank was acting in his individual capacity or at least was not acting within the apparent scope of his authority as the bank's agent. In the case at bar, however, I have already adverted to the clarity of the evidence that showed the transactions of Hart with the bonds in question to have been those of the National Bank. These facts clearly distinguish the case cited by defendant.

This brings us to a consideration of the final contention of defendants that there has been a compromise and settlement of all claims involving the irregularities and defalcations of Hart as City Treasurer and any claim of this plaintiff arising out of the bond transactions that are the subject matter of this action. In support of such contention, it was shown that after discovery of the loss of the securities involved in this suit and of the defalcations of Hart as City Treasurer, four actions were commenced, viz., (1) The Savings Bank commenced a suit against Hart and the surety on his official bond as City Treasurer to

recover the value of these securities converted by Hart. (2) The Savings Bank commenced a suit against the City of Merced to recover the value of the securities converted by Hart. (3) The City of Merced commenced a suit against the Savings Bank to recover the balance of the special deposit of City monies that remained on deposit in plaintiff bank as successor of the Savings bank and, (4) The City of Merced sued Hart and the corporate surety on his official bond to recover City monies of approximately $30,000.00 that Hart misappropriated as City Treasurer, and which included the balance of the special deposit of city money with the Savings Bank amounting to $14,000.00 which plaintiff bank, as successor of the Savings Bank refused to pay over to the city because of the conversion of the bonds by Hart. It further appeared that by negotiation, all of these four suits were dismissed and a settlement reached between litigants. In the settlement, the city received the balance of the special deposit amounting to $14,000.00 from the plaintiff herein, as successor of the Savings Bank wherein the original deposit of $25,000.00 was made by Treasurer Hart of the City's monies. In addition, the city of Merced received from the surety company $11,000.00 in reimbursement for the defalcations of Hart of the city's money and in addition obtained an agreement from the surety company that it would hold the city harmless from any claim of the defendant receiver because of said outstanding city warrants amounting to approximately $3,000.00. In disposing of the suit by the Savings Bank against Hart and the corporate surety on his official bond, it appeared that the surety company asserted the position that it was not liable to the Savings Bank, but an agreement was entered into

between the surety company and the plaintiff bank, as successor of the Savings Bank, which is evidenced by letters that were received in evidence. From these it appears that the surety company paid the various amounts hereinbefore stated and paid to plaintiff, as successor of the Savings Bank, the further sum of $5,500.00, and as part of said adjustment and settlement it was further agreed that plaintiff, as successor of the Savings Bank would commence this action for the value of the bonds converted by the bank, and if it is successful in recovering against the National Bank and its Receiver, it would pay one-half of the net proceeds of the suit to the bonding company. There were other provisions in the settlement, which are immaterial in the consideration of the asserted defense of compromise and settlement. The record fails to substantiate the contention of defendants that plaintiff, as the Savings Bank's successor has accepted full satisfaction from the administrator of Hart's estate and has released his estate from any further liability on account of the conversion by Hart of the bonds in controversy. On the contrary, it appears that the plaintiff has presented its claim against the estate of Hart for the value of its securities that Hart misappropriated and it further appears that no settlement or payment of any kind has been made or received on said claim. All that was done by plaintiff or its assignor was to dismiss the suit against the Administrator of Hart's estate. The record shows no acknowledgment of satisfaction of the claim against Hart or his estate. It is true that where a suitor settles with one of two joint tort feasors and releases such one from further liability, his action is in effect a release of both joint tort feasors, but in my opinion, the proof in this complaint

falls short of bringing the facts of this case within the aforesaid rule. The action of the successor of the Savings Bank in dismissing the case against Hart and the corporate surety on his official bond as City Treasurer to recover the value of the securities converted amounted to nothing more than a covenant not to sue the Hart estate or the Surety Company and can not be said to have been the discharge of a joint tort feasor that would operate to release a National Bank from its liability because of its conversion through the agency of Hart of the bonds of the Savings Bank. The letters consummating the settlement agreed upon by the Surety company, City of Merced and plaintiff contain a reservation by plaintiff as the Savings Bank's successor of its right to pursue the National Bank on Hart's default, and no acquittance is therein given to Hart's estate. The Estate of Hart stands in the position of the joint tort feasor with the National Bank and it has never been released. Neither the surety company nor the city were joint tort feasors with Hart or the National Bank. See Gilbert vs. Finch, 173 N. Y. 455.

However, it does appear that plaintiff has received $5500.00 in the aforesaid settlement which must be applied in law to the demand sued on in this action. There can be but one compensation for an injury or tort of the kind that is involved in this suit, which is the market value of the securities converted at the time of conversion, with interest thereon until judgment. The plaintiff has received partial compensation of its loss. It is immaterial from whom any portion of such damage is paid, but any payment on account thereof reduces the liability pro tanto. Under the aforesaid rule and the evidence in this case, the defendants are undoubtedly entitled to a credit of $5,500.00 on the claim here sued on.

It follows from the foregoing that plaintiff is entitled to findings and judgment under all issues of the complaint and answer herein for the sum of $22,500.00 with interest thereon at the rate of 7% per annum from May 14, 1926, and for its costs of suit herein, all as prayed for in the complaint on file in this cause.

The motion of defendant for special or any findings or judgment contrary to the views expressed in the aforesaid memorandum opinion are and each is denied. Counsel for plaintiff will prepare, serve and present under the rules of this Court findings and judgment in accordance with the views hereinbefore expressed.

Paul J. McCormick
Paul J. McCormick
United States District Judge

Dated May 1, 1929.

Addenda to this Memorandum of Decision on Merits to be filed later.

[Endorsed]: Filed May 2, 1929 R. S. Zimmerman Clerk By Louis J. Somers Deputy

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[Title of Court and Cause.]

No. 357-J

ADDENDA TO MEMORANDUM OF DECISION ON MERITS

In the minute order for judgment in favor of plaintiff herein as well as in the Memorandum of Decision on Merits filed herein, the Court has allowed a reduction and diminution of the liability of defendants under the issues of this case for the sum of $5,500.00, while the briefs of both counsel in this case refer to a payment of $20,000.00 to the plaintiff herein by the corporate surety on the official bond of City Treasurer Hart, I have been unable to

find any evidence in the transcript of testimony and proceedings on trial of this case showing that the plaintiff herein actually received from the surety company the balance of the city's deposit of $25,000.00 that remained in the Savings Bank at the time of the dismissal of the various suits concerning these transactions. The record is clear as shown by the testimony of Mr. F. W. Henderson, page 112, et seq. of the transcript and as disclosed by defendants exhibits E and G that it was part of the settlement that the plaintiff bank upon paying the balance of the city's special deposit to the city would be reimbursed by the surety company. I have not been able to find any further evidence showing that such reimbursement was actually made. Of course, if it is a fact that reimbursement was made and plaintiff actually received any sum of money in addition to the $5,500.00 in the settlement, then under the Memorandum of Decision, defendants would be entitled to credit for such additional amounts received by plaintiff herein, and the order for findings and judgment in favor of plaintiff and against defendants should be correspondingly modified.

If counsel for the respective parties can not agree and file written stipulation herein concerning the reimbursement to plaintiff, and the actual receipt by it of the balance of said special deposit and the fact of such payment can be established, then the defendant will be entitled to pursue such proceedure in this case as will show any amount of money in addition to said $5,500.00 that plaintiff has received in the transactions concerning the dismissal of the four suits involved in this controversy.

Paul J. McCormick
Paul J. McCormick
United States District Judge

Dated May 2, 1929

[Endorsed]: Filed May 3rd, 1929 R. S. Zimmerman Clerk By Louis J. Somers, Deputy.

At a stated term, to wit: The January Term, A. D. 1929 of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 2nd day of May in the year of our Lord one thousand nine hundred and twenty-nine

Present:

The Honorable PAUL J. McCORMICK, District Judge.

Bank of Italy National Trust and Savings Association, a National Banking Association, Plaintiff, vs. The Farmers & Merchants National Bank of Merced, a National Banking Association, and Henry P. Hilliard, as Receiver thereof, Defendants.	CIVIL NO. 357-J

The motion of defendant herein for an order of judgment in favor of defendants and against plaintiff and for special findings in favor of defendant herein and against plaintiff are denied in toto.

Findings and judgment are ordered for plaintiff and against defendants for the sum of $22,500.00 with interest thereon at the rate of 7% per annum from May 14. 1926, with costs of suit herein, upon all issues made by the complaint and answer herein and as prayed for in plaintiffs complaint. Counsel for plaintiff will prepare, serve and present same under the rules of this Court. Memorandum Opinion filed herein this day. Dated May 2, 1929.

[TITLE OF COURT AND CAUSE.]

No. 357-J. Civil.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on regularly for trial on the 24th day of October, 1928, Louis Ferrari, J. J. Posner and F. W. Henderson, appearing as attorneys for plaintiff and Hartley F. Peart and Gallaher & Jertberg as attorneys for defendants, a trial by a jury having been expressely waived by said parties, which waiver was filed in said Court; oral and documentary evidence was adduced by the respective parties and the same was submitted to the Court for decision upon briefs of the respective parties and said Court having duly considered the matter, the Court now finds:

I.

That the allegations and each of the allegations contained in paragraphs I, II, III and IV of said complaint are true.

II.

The Court further finds that it is true that on or about December 31, 1925, MERCED SECURITY SAVINGS BANK was the owner of, in possession of and entitled to the possession of certain negotiable bonds in said complaint and hereinafter described and that at said times J. B. HART was the duly elected, qualified and acting Treasurer of the City of Merced, a municipal corporation, in the County of Merced, State of California, and at all of said times said J. B. HART was the President and Manager of said THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED, and on or about said

date in pursuance of the statute of the State of California, referred to in said complaint, said MERCED SECURITY SAVINGS BANK deposited with said J. B. HART as such Treasurer said negotiable bonds as security for a certain deposit of $25,000. of public moneys belonging to said City then in his custody as such Treasurer and thereupon said MERCED SECURITY SAVINGS BANK received from him as such Treasurer the sum of $25,000. of public moneys belonging to said City.

III.

That on May 13, 1926, without the consent or knowledge of said MERCED SECURITY SAVINGS BANK and without the consent or knowledge of said CITY OF MERCED the said J. B. HART delivered the possession of said negotiable bonds to said THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED.

IV.

The Court further finds that it is true that the said defendant THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED sold and converted to its own use and benefit without the knowledge or consent of MERCED SECURITY SAVINGS BANK or the CITY OF MERCED the following described negotiable bonds, the then property of the MERCED SECURITY SAVINGS BANK, to-wit:

Number.	Description.	Face Value.
27, 28	Santa Monica Storm Drain Bond	$1000.00
22, 27, 28, 29	Santa Monica Fire Apparatus Bond	2000.00
27, 28, 29, 30	Santa Monica Bridge Improvement Bond	2000.00

27, 28, 29, 30	Santa Monica Sewer Bonds,	4000.00
751, 781, 798	City of Los Angeles Water Works Bonds,	3000.00
8625	City of Los Angeles Electric Power Bond,	1000.00

Number.	Description.	Face Value.
268, 269, 270, 271, 272, 274, 277, 280, 1020, 1021, 1022, 1023, 2057, 2058, 2059, 2279, 2280, 2281, 2282, 2283, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, and 2514	(37) Turlock Irrigation Bonds of $400.00 each	$14800.00

That of the bonds described in paragraph V. of the complaint filed in said action on or about May 12th, 1926, said MERCED SECURITY SAVINGS BANK for its own convenience and with the consent of J. B. HART, the then City Treasurer of the City of Merced and President and Manager of said The Farmers and Merchants National Bank of Merced, substituted other securities in place of the following described bonds which are of those described in said paragraph V, to-wit:

Santa Monica Storm Drainage Bonds of the face value of $500.00 each, Nos. 21 and 22,	$1000.00
Santa Monica Fire Apparatus Bonds, No. 21 of the face value of $500.00,	500.00
Santa Monica Bridge Improvement Bonds, Nos. 21 and 22, of the face value of $500.00 each,	1000.00
Santa Monica Sewer Bonds, Nos. 21 and 22, of the face value of $1000.00 each,	2000.00

and at said time with the consent of said J. B. HART as Treasurer so as aforesaid and as security for the deposit of City funds as alleged in said complaint, the following described bonds were substituted:

City of Los Angeles Electric Power Bond No. 8625 of the face value of	$1000.00
City of Los Angeles Water Works Bonds Nos. 751, 781 and 796 of the face value of $1000.00 each,	3000.00

That at the time of the conversion of said bonds so as aforesaid by said defendant THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED the value thereof was and at all times since has been not less than $28,000.00.

That said MERCED SECURITY SAVINGS BANK did not discover and had no knowledge of said conversion of said bonds, nor the sales thereof until subsequent to September 20, 1926, at which time the said THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED went into liquidation.

V.

That subsequent to said September 20, 1926, and prior to February 1st, 1927, said MERCED SECURITY SAVINGS BANK made proof of its claim herein, arising out of the facts alleged in said complaint for damages in the sum of $28,000. for the said conversion of said bonds, which said proof of claim was in writing, duly verified by the Cashier of said MERCED SECURITY SAVINGS BANK and presented to said defendants for allowance and they did on or about February 1st, 1927, reject the said claim and have refused to allow the same or any part thereof or to pay anything thereon; that no part

thereof has been paid except the sum of $5500. which was paid by the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, the corporate surety upon the official bond of said J. B. HART as City Treasurer; that there is unpaid upon the value of said sureties the sum of $22,500.; that no part of which has been paid by said defendants or either of them; that the balance unpaid upon the market value of said sureties converted so as aforesaid at the time of said conversion is the sum of $22,500.

VI.

That it is not true that a surety company paid and/or discharged all or any of the obligations of said J. B. HART as City Treasurer of the City of Merced and of said surety company as his surety as such public officer to said MERCED SECURITY SAVINGS BANK and/or to plaintiff herein other than said sum of $5500.; that it is not true that said MERCED SECURITY SAVINGS BANK and/or said plaintiff has received from any surety company full pay and/or compensation for any and/or all losses sustained by them or by either of them by reason of any or all of the transactions of the said J. B. HART as such Treasurer, or in any manner whatsoever in connection with any and/or all of the bonds mentioned in the complaint filed in said action other than said sum of $5500.

AS CONCLUSIONS OF LAW FROM THE FOREGOING FINDINGS OF FACT THE COURT DEDUCES THE FOLLOWING:

That plaintiff is entitled to the judgment of this Court in the sum of $22,500. with interest thereon at the rate

of seven percent (7%) per annum from May 13, 1926, to September 20, 1926, and for its costs of suit herein.

Let judgment be entered herein in favor of plaintiff establishing the said claim in the sum of $22,500. for conversion of said bonds as a valid claim against said defendants and direct said Receiver to certify the same as a valid claim against defendants to the Comptroller of the Currency of the United States to be paid by him in the due course of the liquidation of the said Bank, together with interest on said sum at the rate of seven percent (7%) per annum from May 13, 1926, to September 20, 1926, Dated, ..., 1929.

.....

Judge of said Court.

Approved as to form as provided in Rule 44.

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.....

Attorneys for Defendants.

[Endorsed]: Filed June 28 1929 R. S. Zimmerman Clerk By Louis J. Somers Deputy.

[Title of Court and Cause.]

NO. 357-J CIVIL.

EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Come now the defendants in the above entitled action, and jointly and severally object to and take exceptions to the proposed findings of the plaintiff herein, as to form and substance in that the form of said findings and the substance thereof, do not include the following matters

material to a determination of a legal judgment in said action, which said matters should be found in the findings in the above entitled action, to wit:

—I—

That on September 1st, 1926, the said Merced Security Savings Bank, the predecessor in interest of the plaintiff in the above entitled action, paid to the treasurer of the City of Merced for the use and benefit of said City the sum of $10,422.55 of said Special Deposit, which Special Deposit was the sum of $25,000, as hereinabove found; that on the 23rd day of August, 1927, the said plaintiff herein paid to the City of Merced the further sum of $15,047.02; that the said sum of $10,422.55 and the said sum of $15,047.02 aggregated the total of said Special Deposit of $25,000 together with interest thereon at the agreed rate of 2½% on daily balances in said account; that the said sum of $5500.00 paid by the Fidelity & Deposit Company of Maryland was paid on or about the 12th day of August, 1927.

—II—

That the said sum of $15,047.02 so paid of said Special Deposit and the accrued interest thereon by the said plaintiff to the said City of Merced on or about the said 23rd day of August, 1927, was then and there repaid to the said bank in full to wit, in the sum of $15,047.02, by the said Fidelity & Deposit Company of Maryland, the Corporate Surety upon the official bond of said J. B. Hart, as such City Treasurer of the said City of Merced, and that said plaintiff received from said Fidelity and Deposit Company of Maryland the said sum of $15,047.02 and appropriated and applied the said sum, and all thereof, to its own use.

—III—

That the said plaintiff and its said predecessor in interest have received the full sum of $20,547.02 of said Special Deposit, and have appropriated the same to the use and benefit of the said plaintiff.

—IV—

That said payments of the said respective sums of $5500.00 and of $15,047.02 made by the said Fidelity & Deposit Company of Maryland to the said plaintiff and its predecessor in interest, were made and paid by way of compromise and settlement of those certain suits and actions then and theretofore pending in the Superior Court of the State of California, in and for the County of Merced, to wit, an action of the Merced Security Savings Bank, a corporation, plaintiff vs. J. B. Hart and the Fidelity & Deposit Company of Maryland, surety for said J. B. Hart as treasurer of the City of Merced, to recover the value of the securities described in the complaint herein, which were deposited by said Merced Security Savings Bank with the said J. B. Hart, as treasurer of said City of Merced; also an action by said Merced Security Savings Bank, a corporation, against the City of Merced, to recover the value of said same securities; also an action by the City of Merced against the Merced Security Savings Bank to recover the then balance of the Special Deposit of $25,000 made by the said J. B. Hart as City Treasurer of the City of Merced, as alleged in the complaint herein, which part thereof was remaining on deposit in the said Merced Security Savings Bank; also an action wherein the City of Merced was plaintiff, and the Administrators of the Estate of J. B. Hart, deceased, and the Fidelity & Deposit Company of Maryland, a cor-

poration, surety for said J. B. Hart, as treasurer of said City of Merced, were defendants, which action sought to recover the alleged defalcations of the said city's moneys by the said J. B. Hart, deceased, while treasurer of the said City of Merced, in the aggregate sum of more than $30,000.00, and which said claim included the then remaining balance of the Special Deposit hereinabove mentioned amounting to in excess of $14,000 principal with accrued interest.

That upon the payment of said sums by said Fidelity & Deposit Company of Maryland, and the payment by said Fidelity & Deposit Company of Maryland of the further sum of $11,000.00 to the said City of Merced, each and all of said causes and actions hereinabove referred to, were dismissed.

Said defendants except to the Conclusions of Law as to form and substance in this: that the Conclusions of Law should be in the following form and substance:

"AS CONCLUSIONS OF LAW FROM THE FOREGOING FINDINGS OF FACT, THE COURT FINDS:

1: That the plaintiff in the above-entitled action, and its predecessor in interest, the Merced Security Savings Bank, have received satisfaction for all of the claims set up and alleged in the complaint herein, and that the plaintiff is entitled to take nothing by reason of its complaint herein, and the defendants are entitled to judgment for costs incurred herein."

Hartley F. Peart
Gallaher & Jertberg
Attorneys for defendants.

[Endorsed]: Filed Jun. 28, 1929. R. S. Zimmerman, Clerk By Louis J. Somers, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CIVIL NO. 357-J

NOTICE OF MOTION TO REOPEN CASE FOR PURPOSE OF TAKING DEPOSITIONS.

To the plaintiff above named and to F. W. Henderson, its Attorney:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE, that on Friday, the 28th day of June, 1929, at the hour of ten o'clock A. M. of said day, or as soon thereafter as counsel can be heard, at the court room of the above-entitled court, in the Federal Building, located in the City of Los Angeles, County of Los Angeles, State of California, the defendant above named will move the above entitled court for an order permitting the defendants to take the depositions of Guy LeRoy Stevick, Vice-President of the Fidelity & Deposit Company of Maryland, a resident of the City and County of San Francisco, and of the Manager of the Branch Bank of the plaintiff corporation, located in the City of Merced, County of Merced, State of California, to establish that the said plaintiff received from said Surety Company the sum of $15,047.02, being the total of principal with accrued interest thereon of the special deposit of the City of Merced in said bank at the time the following cases pending in the Superior Court of the State of California in and for the County of Merced, were stipulated to be dismissed:

1: The Merced Security Savings Bank, under which plaintiff was then transacting business, commenced a suit against Hart and the Surety on his official bond to recover the value of the securities.

2: The same party commenced a suit against the City of Merced to recover the value of the securities.

3: The City of Merced commenced a suit against the Merced Security Savings Bank to recover the balance of the special deposit then remaining on deposit in the plaintiff bank.

4: The City of Merced commenced a suit against Hart and the surety on his official bond to recover on account of his defalcations of the city's moneys, which aggregated over $30,000 and which included the balance of the special deposit amounting to $14,000 held by plaintiff bank, and which it refused to pay over.

And that the depositions so taken shall be used and considered by the court as evidence in the case, and that said case be reopened for the purpose of receiving said evidence.

If it be found that the said Guy LeRoy Stevick and that the said Manager of said Branch bank are unacquainted with the facts, that the deposition of such officer or officers of said Surety Company and said bank, respectively, as are informed as to whether or not said money was paid by said Surety Company, and received by said bank, be taken.

This motion will be based upon all of the records, files and transactions of the above case and upon the affidavit of M. G. Gallaher, one of the attorneys for the defendant in the above entitled action, which affidavit is attached hereto.

Hartley F. Peart
Gallaher & Jertberg

[TITLE OF COURT AND CAUSE.]

CIVIL NO. 357-J

AFFIDAVIT OF M. G. GALLAHER.

STATE OF CALIFORNIA)
) SS.
COUNTY OF FRESNO)

M. G. GALLAHER, being first duly sworn deposes and says:

That affiant is an attorney at law, duly admitted to practice in all of the courts of the State of California, and in the United States District Court, Southern District of California, and a member of the firm of Gallaher & Jertberg, whose offices are in the City of Fresno, County of Fresno, State of California; that affiant conducted the trial of the above entitled action on behalf of the defendants therein; that during the course of said trial one O. A. Turner testified on behalf of the plaintiff therein, and among other things, testified that "And on August 23, 1927, we paid $15,047.02.

Q To whom? A To the City of Merced." (As appears in lines 5 to 7, on page 22 of the transcript of the evidence in the above entitled case.)

Also the same witness testified as to payments of the Special Deposit of the City of Merced in said plaintiff bank, that there was paid

"On September 1, 1926, $10,422.55, and on April—that is the Bank of Italy—August 23, 1927, $15,047.22.

Q Now you state that the Bank of Italy made this payment in August of 1927?

A Yes, sir.

Q In the interim the Merced Security Savings Bank had then transferred its assets to the Bank of Italy National Trust & Savings Association?

A Yes, sir.

Q The amount that you have mentioned there totaled an amount in excess of $25,000. What was it that difference represented?

A Represented interest on the deposit.

Q The obligation of the bank, according to the application for City funds, was to pay interest at the rate of 2½% on daily balance; is that right?

A Yes, sir."

(As appears from lines 6 to 22 inc., transcript of the evidence in the above entitled case)

Mr. F. W. Henderson testified on behalf of the defendants in said action, stating:

"I have a letter, Mr. Gallaher, that probably would state that more clearly than this. The Fidelity & Deposit Company of Maryland paid to the City of Merced $11,000 in cash, as I recall it, and subsequent to that time, or about that time, the Bank of Italy paid to the City of Merced the amount that is mentioned in this letter; but the interest is calculated.

THE COURT: $15,047.02.

A I think that is it.

THE COURT: That has already been shown.

MR. GALLAHER: Very well. Now that was done by agreement between the City of Merced, the Bank of Italy and the Fidelity & Deposit Company, was it not?"

A Well, those payments were made on account of the suit that you have spoken of here, that is referred to, and also on account of the suit that the City of Merced brought

against the Merced Security Savings Bank, and which suit involved the balance of the deposit that had been made by J. B. Hart as treasurer with the Merced Security Savings Bank."

(As appears from line 9, p. 112 to line 4, p. 113, transcript of the evidence in the above case.)

Also

"THE COURT: There seems to have been four suits brought.

MR. GALLAHER: Yes.

A I think so."

(As appears from lines 22 to 24, p. 114, Transcript of the evidence in the above case.)

Also

"THE COURT: Wasn't there a cross-action; didn't you say there was a cross-action by the Bank against the City?

A Yes.

Q Was that disposed of? A Yes."

(As appears from line 22 to 26, p. 115, Transcript of the evidence in the above case.)

Also

"Q At any rate, after these several actions, or four actions were brought, then all of the parties, including the official bondsmen of J. B. Hart, the Fidelity & Deposit Company and the Bank of Italy and its predecessor and the City of Merced compromised and settled all of those suits by the City releasing any claim against either the Deposit Company of the bank, upon the Deposit Company paying to the City $11,000, and the bank paying the remainder of the $25,000 deposit plus accrued interest on that remainder?

A No, that is not the settlement, Mr. Gallaher. I have some correspondence there which will show just what the final disposition of the matter was; that is in writing.

MR. GALLAHER: Well, get your correspondence.

A Here is a letter from Louis Ferrari from the bonding company formally closing the transaction."

(As appears from line 15, p. 116 to line 3, p. 117, transcript of the evidence in the above case.)

Two letters were then introduced as one exhibit, being "Defendants' Exhibit E."

(As appears from lines 19 to 21, p. 117, Transcript of the evidence in the above case.

Also, letter of Louis Ferrari to Mr. Henderson, introduced as Defendants' Exhibit "H," and also letter of August 16, 1927, from the Fidelity & Deposit Company, Defendants' Exhibit "H."

Also, Mr. Henderson testified:

"A Here is a letter to Louis Ferrari from the bonding company formally closing the transaction.

Q That was a settlement of all of them; this litigation?

A This letter states—this letter was written and declares a part of the terms of the settlement.

Q Of all of the litigation between these four various parties?

A In connection with that."

(As appears from lines 2 to 9 inc. p. 117, Transcript of the evidence in the above case)

The letter referred to is as follows:

"FIDELITY AND DEPOSIT COMPANY

(Letterhead)

August 12, 1927.

"Mr. LOUIS Ferrari,
Vice President,
Bank of Italy,
San Francisco.

In re J. B. HART.

Dear Sir:

I beg to confirm the terms of settlement of claims against us under the above bond, to wit:

1. We will pay to the City of Merced, the sum of $11,000.

2. We agree to hold the City of Merced harmless from the claim of the Receiver based upon certain warrants aggregating $3,027.62.

3. We will pay to you the amount of the City's deposit and interest upon it at the rate agreed to be paid by your bank (This amount to be paid by you to the City).

4. We will pay to you further the sum of $5,500. and will agree also to pay you one-half of any saving which we may make on the claim of the Receiver against the City. It is to be understood, however, that we reserve the right to pay that claim in full, or to make any adjustment we think best.

5. We understand you will at once bring suit against the Receiver of the Farmers & Merchants Bank for the value of the bonds misappropriated by that bank, and that in consideration of the payments made to you you will, if successful, pay to us one-half of the net proceeds of that suit after deducting all costs, expenses and attorneys fees. In case either you or we are reimbursed in full for any

loss then the other party shall be entitled to the balance of the net proceeds until it is fully reimbursed.

I am sending a copy of this letter to Mr. Henderson, and *he if* and you advise that this is satisfactory we will make payment forthwith.

Yours very truly,
(signed) Guy LeRoy Stevick,
Vice-President."

Affiant further says that in view of the fact that the said Henderson testified that said letter was a letter "formally closing the transaction" and that said letter agreed to pay to the Bank of Italy the amount of the City's deposit and interest upon it at the rate agreed to be paid by your bank (this amount to be paid by you to the City)" established the fact in connection with Henderson's testimony, that that letter closed the transaction with reference to all four cases; that the Fidelity & Deposit Company did pay to the plaintiff the sum of $15,047.02, which amount was, as shown by the testimony of O. A. Turner, paid to the City of Merced for the remainder of the principal and interest of the Special Deposit, and affiant in the conduct of said trial inadvertently omitted to prove by direct positive statement of any witness that said sum of $15,047.02 was actually paid by said Fidelity & Deposit Company to said plaintiff, and affiant is informed and believes, and upon such information and belief alleges the fact to be that said sum of $15,047.02 was actually paid by said Fidelity & Deposit Company to said plaintiff, pursuant to said letter, and was paid prior to August 23, 1927, and was on August 23, 1927, paid to the City of Merced by said plaintiff, and that the officers of said plaintiff bank

and of said Fidelity & Deposit Company are informed of said fact and will so testify if their depositions be taken.

M. G. Gallaher

[Seal]

Subscribed and sworn to before me this 21st day of June, 1929.

Evelyn Edwards
Notary Public in and for the County of Fresno, State of California.

[Endorsed]: Filed Jun 28 1929 R. S. Zimmerman, Clerk By Louis J. Somers, Deputy Clerk

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At a stated term, to wit: The April Term, A. D. 1929 of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 28th day of June in the year of our Lord one thousand nine hundred and twenty-nine

Present:

The Honorable Paul J. McCormick, District Judge.

Bank of Italy National Trust and Savings Association, a National Banking Association, Plaintiff, vs. The Farmers and Merchants National Bank of Merced, a National Banking Association and Henry P. Hilliard, as Receiver thereof, Defendants.	No. 357-J Civ.

This cause coming on for hearing on Motion to reopen case for the purpose of taking depositions, and for hearing

on Exceptions to proposed findings of fact and conclusions of law; Motion to reopen is now presented by Gilbert Jertberg, Esq., as counsel for the defendants, and F. W. Henderson, Esq., appearing as counsel for the plaintiff, replies, and having at this time filed proposed findings and presented same for settlement, a statement in reply is made by Attorney Gilbert Jertberg, who argues in furtherance of defendants' Exceptions to proposed findings, whereupon objections to findings of fact and conclusions of law are tentatively sustained; Motion of defendants to reopen cause is granted, for hearing evidence on the one issue stated in Motion to reopen, alone, and it is ordered that either litigant may introduce testimony on that issue; making and entry of findings of fact and conclusions of law herein are ordered suspended until further order of the Court. It is now stipulated by counsel in open court that depositions of officers named in Motion of respective corporations be taken, and that depositions, when taken, be returned by notary public to this court, and that matter then stand submitted, which stipulation is approved by the Court.

At a stated term, to wit: The April Term, A. D. 1929 of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 21st day of August in the year of our Lord one thousand nine hundred and twenty-nine.

Present:

The Honorable Paul J. McCormick, District Judge.

BANK OF ITALY NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association, Plaintiff, vs. THE FARMERS & MERCHANTS NATIONAL BANK OF MERCED, a National Banking Association, and HENRY P. HILLIARD, as Receiver thereof, Defendants.	No. 357-J

MINUTE ORDER FOR JUDGMENT UPON SUBMISSION OF CAUSE SUBSEQUENT TO ORDER REOPENING SAME.

It now appearing from stipulation filed herein July 17, 1929, that this action is now submitted for decision and upon consideration of said stipulation and the deposition of Guy Leroy Stevick filed herein July 20, 1929, it is now ordered pursuant to the Memorandum of Decision on Merits and addenda to Memorandum of Decision on Merits heretofore made and filed herein that findings and judgment are ordered for plaintiff herein according to the prayer of its complaint, less the sum of $5,500.00 and an additional sum of $15,047.02, for which amounts credit must be given in such findings and judgment.

Plaintiff's counsel will accordingly prepare, serve, and present findings and judgment in accordance herewith under the rules of this Court.

Dated August 21, 1929.

[TITLE OF COURT AND CAUSE.]

NO. 357-J CIVIL.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on regularly for trial on the 24th day of October, 1928, Louis Ferrari, J. J. Posner and F. W. Henderson, appearing as attorneys for Plaintiff, and Hartley F. Peart and Gallaher & Jertberg, as attorneys for defendants; a trial by a jury having been expressly waived in writing by said parties, which waiver was filed in said court; oral and documentary evidence was adduced by the respective parties and the same was submitted to the Court for decision upon briefs of the respective parties, and thereafter the Court having vacated the order submitting said cause and ordering the taking of further testimony in said matter, which has been done in conformity to said order, and the said cause having thereafter been ordered submitted to said Court for decision and said Court having duly considered the matter, the Court now finds:

I

That the allegations and each of the allegations contained in paragraphs I, II and III of said complaint are and each of them is true.

II

That the allegations and each of the allegations contained in paragraph IV of said complaint are true, except the allegation in said paragraph in said complaint contained, as follows: "to the damage of said Merced Security Savings Bank in the sum of $28,000" and the Court finds in this connection that the said Merced Security Savings Bank was damaged in the sum of $27,300.

III

That it is not true as alleged in paragraph VI of the complaint that at all times in the complaint mentioned said negotiable bonds were of the market value of $28,000, or any other sum in excess of $27,300.

IV

The Court further finds that it is true that on or about December 31, 1925, MERCED SECURITY SAVINGS BANK was the owner of, in possession of and entitled to the possession of certain negotiable bonds in said complaint and hereinafter described, and that at said time J. B. HART was the duly elected, qualified and acting Treasurer of the City of Merced, a municipal corporation, in the County of Merced, State of California, and at all of said times said J. B. HART was the President and Manager of said The Farmers and Merchants National Bank of Merced, and on or about said date in pursuance of the statute of the State of California, referred to in said complaint, said Merced Security Savings Bank deposited with said J. B. HART as such Treasurer said negotiable bonds as security for a certain deposit of $25,000 of public moneys belonging to said City then in his custody as such Treasurer and thereupon said Merced Security Savings Bank received from him as such Treasurer the sum of $25,000 of public moneys belonging to said City, and said sum of $25,000 was deposited in said plaintiff's bank to the credit of said City of Merced and subject to the warrants of said City of Merced duly allowed and executed and presented for payment; that various warrants were presented for payment and were paid out of said funds, but said account was carried until the 23rd day of August, 1927, at which time there was then in said account and in

the possession of said Bank the sum of $14,577.45, which sum on said 23rd day of August 1927 was paid out by said Bank to the said City of Merced and said account was then and there closed

V

That on May 12, 1926, without the consent or knowledge of said Merced Security Savings Bank and without the consent or knowledge of said City of Merced the said J. B. HART delivered the possession of said negotiable bonds to said The Farmers and Merchants National Bank of Merced.

VI

The Court further finds that it is true that the said defendant The Farmers and Merchants National Bank of Merced sold and converted to its own use and benefit without the knowledge or consent of Merced Security Savings Bank or the City of Merced the following described negotiable bonds, the then property of the MERCED SECURITY SAVINGS BANK, to wit:

Number	Description.	Face Value.
27, 28	Santa Monica Storm Drain Bond	$1000.00
22, 27, 28, 29	Santa Monica Fire Apparatus Bond	2000.00
27, 28, 29, 30	Santa Monica Bridge Improvement Bond	2000.00
27, 28, 29, 30	Santa Monica Sewer Bonds	4000.00
751, 781, 796	City of Los Angeles Water Works Bonds	3000.00
8625	City of Los Angeles Electric Power Bond	1000.00

Number	Description.	Face Value.
268, 269, 270, 271, 272, 274, 277, 280, 1020, 1021, 1022, 1023, 2057, 2058, 2059, 2279, 2280, 2281, 2282, 2283, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, and 2514.	(37) Turlock Irrigation Bonds of $400.00 Each,	$14800.00

That of the bonds described in paragraph V of the complaint filed in said action on or about May 12th, 1926, said MERCED SECURITY SAVINGS BANK for its own convenience and with the consent of J. B. HART, the then City Treasurer of the City of Merced and President and Manager of the said The Farmers and Merchants National Bank of Merced, substituted other securities in place of the following described bonds which are of those described in said paragraph V, to wit:

Santa Monica Storm Drainage Bonds of the face value of $500.00 each, Nos. 21 and 22	$1000.00
Santa Monica Fire Apparatus Bonds, No. 21, of the face value of $500.00,	500.00
Santa Monica Bridge Improvement Bonds Nos. 21 and 22, of the face value of $500.00 each,	1000.00
Santa Monica Sewer Bonds, Nos. 21 and 22, of the face value of $1000.00 each,	2000.00

and at said time with the consent of said J. B. HART as Treasurer so as aforesaid and as security for the deposit of City funds as alleged in said complaint, the following described bonds were substituted:

City of Los Angeles Electric Power Bond No. 8625 of the face value of	$1000.00
City of Los Angeles Water Works Bonds Nos. 751, 781 and 796 of the face value of $1000.00 each,	3000.00

That at the time of the conversion of said bonds so as aforesaid by said defendant THE FARMERS and MERCHANTS NATIONAL BANK OF MERCED the value thereof was and at all times since has been not less than $27,300.00.

That said Merced Security Savings Bank did not discover and had no knowledge of said conversion of said bonds, nor the sales thereof until subsequent to September 20, 1926, at which time the said The Farmers and Merchants National Bank of Merced went into liquidation.

VII

That subsequent to said September 20, 1926, and prior to February 1st, 1927, said MERCED SECURITY SAVINGS BANK made proof to its claim herein arising out of the facts alleged in said complaint for damages in the sum of $27,300 for the said conversion of said bonds, which said proof of claim was in writing, duly verified by the Cashier of said MERCED SECURITY SAVINGS BANK and presented to said defendants for allowance and they did on or about February 1st, 1927, reject the said claim and have refused to allow the same or any part thereof or to pay anything thereon; that no part thereof has been paid except the sum of $20,547.02, which was paid by the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, the corporate surety upon the official bond of said J. B. Hart as City Treasurer, which said sum of $20,547.02 was so paid by said Fidelity and Deposit

Company of Maryland to said plaintiff in the above-entitled action on the 23rd day of August, 1927; that there is unpaid upon the value of said securities the sum of $6,752.98, no part of which has been paid by said defendants or either of them; that the balance unpaid upon the market value of said securities converted so as aforesaid at the time of said conversion is the sum of $6,752.98.

VIII

That it is not true that a surety company paid and/or discharged all or any of the obligations of said J. B. HART as City Treasurer of the City of Merced and of said surety company as his surety as such public officer to said Merced Security Savings Bank and/or to plaintiff herein other than said sum of $20,547.02; that it is not true that said MERCED SECURITY SAVINGS BANK and/or said plaintiff has received from any surety company full pay and/or compensation for any and/or all losses sustained by them or either of them by reason of any or all of the transactions of the said J. B. Hart as such Treasurer, or in any manner whatsoever in connection with any and/or all of the bonds mentioned in the complaint filed in said action other than said sum of $20,547.02.

AS CONCLUSIONS OF LAW FROM THE FOREGOING FACTS, the Court finds the following:

That plaintiff be entitled to the judgment of this Court in the sum of $6,752.98, with interest thereon at the rate of seven per cent (7%) per annum from August 23, 1926, to September 20, 1926, and for its costs of suit herein.

Let judgment be entered herein in favor of plaintiff establishing the said claim in the sum of $6752.98 for conversion of said bonds as a valid and preferred claim against said defendants and directing said Receiver to

certify the same as a valid and preferred claim against defendants to the Comptroller of the Currency of the United States to be paid in full by him in the due course of the liquidation of the said Bank, together with interest on said sum at the rate of seven percent (7%) per annum from August 23, 1926 to September 20, 1926.

Dated Jan. 27th, 1930.

Paul J. McCormick
Judge of said Court

Approved as to form as provided in Rule 44.
Hartley F. Peart
Gallaher & Jertberg
Attorneys for Defendants.

[Endorsed]: Filed Jan 29, 1930. R. S. Zimmerman Clerk By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

No. 357-J. Civil

JUDGMENT

This cause came on regularly for trial on October 24, 1928, Louis Ferrari, J. J. Posner and F. W. Henderson, appearing as attorneys for plaintiff and Hartley F. Peart and Gallaher and Jertberg as attorneys for defendants, a trial by Jury having been expressly waived in writing by said par*i*tes, which waiver was filed in said Court; oral and documentary evidence was adduced by the respective parties and the same was submitted to the Court for decision upon briefs of the respective parties, and thereafter the Court having vacated the Order submitting said cause

and ordering the taking of further testimony in said matter, which has been done in conformity to said order, and the said cause having thereafter been ordered submitted to said Court for decision and said Court having duly considered the matter, and having settled, allowed and signed its findings of fact and conclusions of law therein and ordered judgment in favor of plaintiff against defendants in accordance therewith.

NOW THEREFORE, in accordance with the findings of fact and conclusions of law referred to Judgment is hereby entered in favor of plaintiff against defendants establishing its claim against them in the sum of $6,752.98 for conversion of the bonds referred to in said findings as a valid and preferred claim against said defendants and said Receiver Defendant therein, is hereby directed and ordered to certify the same as a valid and preferred claim against said defendants to the Comptroller of the Currency of the United States to be paid in full by him to said Receiver in the course of the liquidation of the said Bank, together with interest on said sum at the rate of seven (7%) percent per annum from August 23, 1926 to September 20, 1926, to-wit: $36.76, and for costs of suit herein in the sum of $58.15

Dated: January 27th, 1930.

Paul J. McCormick
Judge of said Court.

Approved as to form as provided in Rule 44
Hartley F. Peart
Gallaher & Jertberg
Attorneys for Defendants.

(Testimony of O. A. Turner.)

JUDGMENT ENTERED JANUARY 29th, 1930,
R. S. ZIMMERMAN Clerk
By Louis J. Somers,
J. Bk. 2/30. Deputy Clerk.

[Endorsed]: Filed Jan. 29, 1930, R. S. Zimmerman, Clerk, By Louis J. Somers, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

No. 357-J - CIVIL

BILL OF EXCEPTIONS.

This cause came on regularly for trial before the court sitting without a jury, a jury having been by written stipulation, as required by law, waived, F. W. Henderson appearing for the plaintiff and Messrs. Hartley F. Peart and Gallaher & Jertberg appearing for the defendants. An opening statement was made on behalf of plaintiff during which it was stipulated between the parties to the action that the City of Merced at all times mentioned in the complaint was a city of the sixth class, organized under the Municipal Incorporation Act of the State of California, and thereupon the following proceedings were taken and had:

TESTIMONY OF O. A. TURNER.

O. A. Turner, a witness called on behalf of plaintiff, testified as follows: "I am employed by the plaintiff in this action at its Merced Branch as Assistant Manager and Assistant Trust Officer. Prior to my employment

(Testimony of O. A. Turner.)

with it I was employed by Merced Security Savings Bank for approximately seventeen years as Assistant Cashier. I knew J. B. Hart in his life time and during the time that he was City Treasurer of the City of Merced and during the same time I knew him to have been the President of Farmers & Merchants National Bank of Merced, its active and executive officer. I succeeded Mr. Hart as Treasurer by appointment in the latter part of September, 1926 and since by election and I am now City Treasurer. In December of 1925 on behalf of Merced Security Savings Bank I had dealings with J. B. Hart as Treasurer of said city in connection with the deposit of certain funds belonging to the City of Merced amounting to $25,000.00 in Merced Security Savings Bank. It had made written application to J. B. Hart as Treasurer for the deposit of that amount of city funds. The original application cannot be found. This is a copy of it." Thereupon it was offered in evidence, marked Plaintiff's Exhibit 1. "After this application was made Merced Security Savings Bank turned over to J. B. Hart as Treasurer of said city the bonds described in said application. This was on or about the date of the application On or about May 12, 1926 Merced Security Savings Bank made out a second application for deposit of city funds. At that time the bank had not paid back to Mr. Hart as Treasurer or to the city any of the original deposit of $25,000.00 which it received from Hart as such Treasurer funds of said city contemporaneously with the delivery of said bonds. At the time of the second application in lieu of the Santa Monica bonds described in the first application amounting to $4500.00 in par value there was substituted $4000.00

(Testimony of O. A. Turner.)

par value of Los Angeles bonds. From the time the first bonds were put up in December, of 1925 with Mr. Hart he kept them continuously so far as I know with the exception of the Santa Monica bonds which were substituted for Los Angeles bonds neither Merced Security Savings Bank nor its successor, the plaintiff in this action, received from J. B. Hart or any one else at any time whatsoever any of the bonds that were placed as collateral security for the first deposit other than the Santa Monica bonds for which the Los Angeles bonds were substituted nor any of the Los Angeles bonds referred to after their substitution. The second application made to Hart as Treasurer was in writing. The original is lost. This is a copy thereof." At this point the second application was introduced and admitted in evidence and marked Plaintiff's Exhibit 2. With the exception of the substitution mentioned the original deposit of bonds was left intact.

"On September 1, 1926, some months after the second application was made, the Merced Security Savings Bank paid over to the City of Merced of the original deposit of $25,000.00 upon warrants drawn the sum of $10,422.55. On August 23, 1927 the plaintiff in this action paid to the City of Merced the balance of the special deposit plus accrued interest, in all $15,047.02. The city was entitled to interest at the rate of 2½ per cent. per annum on the daily balance of funds belonging to the city on deposit with the plaintiff. The Bank of Italy, plaintiff in this action, has succeeded by a transfer in writing duly executed to all of the rights of Merced Security Savings Bank in the bonds in question." At this point plaintiff offered in evidence and there was received and marked as Plain-

(Testimony of O. A. Turner.)

tiff's Exhibit 3 the written transfer executed by Merced Security Savings Bank of all of its assets to plaintiff.

"The market value of the securities described in the second application and the ones involved in this action was on or about May 13, 1926 and continuously since said time has been approximately par, to wit, $27,800; that interest coupons attached thereto would bring the highest market value since that time to approximately $28,000.

CROSS EXAMINATION.

"I became Treasurer of the City of Merced in September, 1926 and have been such treasurer ever since that time. At the present time I am Assistant Manager and Assistant Trust Officer Merced Branch of the plaintiff. I did not personally transact the business with reference to the deposit of city funds by J. B. Hart as city treasurer and the delivering of the bonds. That was done by H. B. Stoddard on behalf of Merced Security Savings Bank. Since the sale of its assets Mr. Stoddard has not been connected with the Merced Security Savings Bank and has not at any time been connected with the plaintiff bank. I entered the employ of plaintiff January 1, 1927; before that I was cashier of Merced Security Savings Bank. I had personal knowledge of the transaction relating to the deposit of city funds and the turning over of bonds by the bank to Hart as Treasurer. Our bank got $25,000.00. On September 21, 1926 Merced Security Savings Bank returned to the city $10,426.55. We paid a check for that amount, that is the check of the Treasurer of the City of Merced. On August 23, 1927 we paid a City of Merced warrant amounting to $15,047.02 direct to the City of Merced. None of the bonds that we had put up

(Testimony of O. A. Turner.)

were ever returned to, or received by, the Merced Security Savings Bank or the plaintiff bank. At the time the plaintiff bank paid to the city the $15,000. plus it did not demand the return of any of its securities and none were returned. On September 1, 1926 when the $10,000.00 plus was paid back J. B. Hart was then City Treasurer. At that time no demand was made by the Merced Security Savings Bank for the return of any of the securities that had been placed by the bank with the City Treasurer and no bonds were returned by the City Treasurer to the bank. None of the bonds of the face value of $27,800.00 or thereabouts have ever been returned to Merced Security Savings Bank or tc the plaintiff bank. I do not know if any demand was made on J. B. Hart for their return."

Q. by Mr. Gallaher: Why was it that you paid out $10,000. plus without taking up any of those bonds? A. "Well, it was an active account and our deposits were high some days and low on others. Naturally on any active account we expect the deposit to be active and at that time we did not withdraw the collateral. By an active account I mean one that might be added to or taken from at any time. one that is not dormant. We were of the opinion that Hart would keep his balance up to that amount ($25,000.00). I do not know why when the payment of $15,000.00 plus which closed that account was made in August, 1927 it was made without taking any of the securities. I did not have anything to do with that particular transaction other than to receive, as City Treasurer, the payment." At this point Mr. Henderson, as attorney for plaintiff, and Mr. Gallaher representing the defendants engaged in a discussion with reference to the demand for

(Testimony of W. E. Landram.)

the return of the bonds concerning which Mr. Gallaher inquired upon whom the written demand was made to which Mr. Henderson answered, "Upon the Treasurer of the city and the city itself as represented by the Board of Trustees. The then Treasurer was Mr. Turner. Hart resigned in 1926 and died shortly afterwards. After this demand was made plaintiff bank paid over the balance of the account to the City Treasurer. No securities were returned for the reason that none were held by the city or the Treasurer at that time."

TESTIMONY OF W. E. LANDRAM.

W. E. Landram, called as a witness on behalf of plaintiff, after being duly sworn, testified as follows: "I was vice-president of Farmers and Merchants National Bank for three or four years, that is in the latter part of 1924, in 1925 and in 1926 until the bank failed. I knew J. B. Hart. During the time I was connected with the bank he was President and Active Manager. Early in 1926 I received instructions from J. B. Hart with reference to certain bonds that were subsequently sold to the First National Bank in Fresno. He called me in from the front of the bank into where he was doing business at his desk and says: 'Here is a roll of bonds' which he had wrapped up and tied up and he says, 'I have made arrangements with Mr. Vaughn at Fresno to take these bonds. It is now a quarter past one or about that time and you will have to get in your car and hurry down there before their bank closes. I want you to deliver them to Mr. Vaughn and he will give you a draft for it which I was acting as messenger to do.' He said just to mention to Mr. Vaughn,

(Testimony of W. E. Landram.)

'These bonds, I may want to take them up later on.' I naturally inferred there would be a note sent down to sign. I asked him if there was anything else but there was no note or anything of the kind. After being so instructed I took the roll that he gave me and came to the First National Bank in Fresno and delivered them and got a draft and returned to Merced. I dealt with three here in Fresno. Mr. Vaughn referred me to a man—I cannot tell his name, commenced with Z, and told me he would take care of me. This was in the First National Bank in Fresno. This man went out with the bonds in the other room, said he wanted to go out and look up the list. When I got to Fresno I went to Mr. Vaughn and said to him, 'Here is some bonds Mr. Hart asked me to bring down and said he had arranged with you to take care of the matter and you would give me a draft to return.' They then counted them (the bonds) and gave me a draft. I then returned to Merced. I saw Mr. Hart. He was at the Farmers & Merchants National Bank when I returned at five o'clock. He asked if everything was all right and I says, 'The draft shows it, don't it'? I gave it to Mr. Hart. I do not know what became of it afterwards. I think it was payable to our correspondent in San Francisco, American National Bank. We had two correspondents for a while and I think it was at that time The American National Bank. Later on, about two or three months after that or whatever time it was—it was in the same year, in the spring of the year, Hart asked me to return to Fresno and get the bonds and gave me a check to take them up. When I got the bonds first from Mr. Hart I did not examine the package to see what was contained therein nor at any

(Testimony of W. E. Landram.)

time afterwards. After the package had been opened in Fresno in the First National Bank and when he came back in there to give me the draft he had the bonds with him and says, 'Here is the bonds' and counted them out. When Hart tole me to go to Fresno and get the bonds and gave me a draft for them he said, 'I want to make some changes in these and sell them—part of them.' I went to Fresno to the same man in the First National Bank there and told him that Mr. Hart wanted the bonds back. I think it was Mr. Vaughn I saw. I got the return of the bonds, I gave him the draft and paid them the difference in interest that had accrued there and took the bonds and returned to Merced. I think these are the instruments which he gave me" (referring to plaintiff's Exhibit 4, two cashier's checks, one for $10,000.00 and one for $18,000.00 and the personal check of W. E. Landram for $521.68 which were then offered and admitted in evidence and marked Plaintiff's Exhibit 4). At this point it was stipulated between counsel that on March 27, 1926 the First National Bank in Fresno delivered to W. E. Landram a draft drawn payable to the Farmers & Merchants National Bank of Merced for the sum of $28,300.00 drawn on the American Bank of San Francisco which was placed to the credit of the Farmers & Merchants National Bank of Merced in the Federal Reserve Bank of San Francisco which was a correspondent of the Farmers and Merchants National Bank of Merced. The witness continued: "One of the three instruments which were used in connection with the second transaction that I had to do with these bonds is a check dated May 12, 1926 for $521.68 payable to the First National Bank in Fresno, signed by me and drawn

(Testimony of W. E. Landram.)

on the Farmers & Merchants National Bank of Merced. This was filled out in the First National Bank in Fresno. I asked them to look up the interest. My instructions were to pay the interest and the difference by check and that Mr. Hart would take care of it when I came back. It was the interest on those bonds and $300.00 that was lacking of the $28,300.00. I got the bonds and returned to Merced and saw J. B. Hart at the Farmers & Merchants National Bank. He asked if everything went all right. I told him they expressed themselves as pleased at his being able to take them up. He said nothing in particular only that he was satisfied with the transaction. Up to this time Hart had said nothing to me concerning whose bonds they were. After that I again brought the bonds back to Fresno. This was a day or so later and to the same bank and under instructions from Hart who said, 'We are not able to carry them and I want you to take the bonds back again. I have had additional drafts on us that requires us to get more money.' That is all I remember of, he simply instructed me to go back and return the bonds and get the money. I received the bonds in a package done up. It was wrapped and sealed if I remember correctly. That was only one or two days after I returned for the bonds there. After I got the bonds I put them thru the same bank in Fresno, delivered them to the First National Bank in Fresno and received a draft for them and returned to Merced and then received this draft which you now show me. I brought the bonds down first in March and then I came later and took these bonds back to Merced, then one or two days later I brought the bonds back again. I sold the bonds to the Bank in Fresno and delivered them there twice. The last draft which I received I took to

(Testimony of E. L. R. Trimble.)

Merced and delivered it to Mr. Hart. He was then in the Farmers & Merchants National Bank." It was here stipulated that the draft referred to by the witness was put thru the usual channels and collected by the Farmers & Merchants National Bank and placed to its credit with its correspondent bank in San Francsico. The witness continuing: "I had nothing more to do with these bonds. The last I saw of them they were delivered to the First National Bank in Fresno."

CROSS EXAMINATION.

"The bonds were sold at $28,300.00 and there was accumulated interest on those bonds from the first of the year and all over and above the $28,000.00, $300.00 of that check applies on the bonds and the balance was the interest on the bonds from the first of the year up to that time. Hart instructed me to do this. He told me to give my check for it to pay them the accrued interest. The First National Bank in Fresno took the bonds at their value when I delivered them first and this was the interest that had accumulated on the bonds from the time I had delivered them there first until I took them up. That check did not go thru my account. Hart took it up. He took care of that. I do not know that that was taken up by Hart. I do not know whether it was charged against the Farmers & Merchants Bank." At this juncture it was stipulated that Mr. Landram's check was subsequently charged to the account of J. B. Hart.

TESTIMONY OF E. L. R. TRIMBLE.

E. L. R. Trimble, a witness called on behalf of plaintiff, being first duly sworn. testified as follows: "I have been connected with the First National Bank in Fresno

(Testimony of E. L. R. Trimble.)

since 1920, first as Assistant Cashier and the last year and a half as Cashier. I know N. D. Vaughn. He was employed in the same bank in 1923 and continuously up to the fore part of 1927 as Cashier. In March of 1926 I was Assistant Cashier. I met J. B. Hart once. I had no dealings with Mr. Hart at all. Mr. Vaughn turned the transaction concerning the bonds over to me and I handled it. This was on March 26, 1926. This date is the one shown on our bond warrants and securities original entries in our general ledger which entries are as follows: March 26, various bonds, irrigation district and street improvement bonds $28,300.00, we charged our bond warrant and securities acccunt on that date with that amount. The bonds are listed more definitely in the regular bond ledger. Other entries on our bank record from which I am reading show that on May 12, 1926 The Farmers & Merchants National Bank of Merced purchased these bonds from us on the face amount of $28,300.00. That entry is as follows: May 12, Santa Monica and Turlock Irrigation bonds $28,300.00. I handled the transaction. I delivered the bonds back to the representative of the Farmers & Merchants National Bank—W. E. Landram. In March, 1926 I handled the transaction in accepting the bonds and making the payment. I dealt with W. E. Landram. He did not say anything particular to me as I remember, turned the bonds over to me and I gave him a draft on San Francisco in payment of them. Mr. Vaughn had turned the matter over to me to handle. Mr. Landram was present when this was done. He came in as I remember it and spoke to Mr. Vaughn and Mr. Vaughn told me to handle the transaction. He told me we were

(Testimony of E. L. R. Trimble.)

going to purchase the bonds and pay for them at par value. Well, as I remember it he (Vaughn) said that we were going to purchase these bonds from the Farmers & Merchants National Bank of Merced and for me to take them and handle them in the usual way, debit our bond and warrant securities account and give Mr. Landram a check for the proceeds, that is a draft. I drew the draft myself, made it payable to the Farmers & Merchants National Bank of Merced. Landram turned the bonds over and said they wanted a San Francisco draft for them. We kept a bond register which identified the particular bonds that we received. These are the bond security ledger pages taken from our general ledger and this gives a history of each particular bond taken from our bond register. These are all tax free bonds and were carried under the caption 'Tax free bonds.' I will now read from our records the entries thereon that have to do with the transactions that are involved in March, 1926: March, 1926 under that head of City of Santa Monica sewer improvement bonds we purchased $6000.00. They are identified by numbers 21-22-27-28-29-30 of denominations of $1000. Santa Monica sewer improvement bonds (the witness continuing reading from the record) City of Santa Monica Fire Apparatus bonds numbers 21-22-27-28 and 29, denominations of $500. each which totaled $2500.00. City of Santa Monica storm drain improvement bonds numbers 21-22-27 and 28, denominations of $500. each, total of $2000.00; City of Santa Monica Bridge Improvement bonds, Nos. 21-22-27-28-29 and 30, denominations of $500. each, total of $3000.00; March 26, Turlock Irrigation District bonds Nos. 2057 to 2059, inclusive, and 2279

(Testimony of E. L. R. Trimble.)

to 2283, inclusive, 2498 to 2514, inclusive, 268 to 272, inclusive, 274, 277, 280, 1020, 1021, 1022, 1023 and 1081, these are all in denominations of $400. each. These Turlock bonds figure out $14,800.00. Other entries in our records show that on May 12, 1926 these bonds were sold back to Farmers & Merchants Bank. Under date of May 12 our record here shows: Sold $6000.00 City of Santa Monica Sewer Improvement bonds. That is all of the record with reference to City of Santa Monica Sewer Improvement bonds also City of Santa Monica Fire Apparatus Improvement bonds sold $2500.00 May 12. On the same date $2000.00 City of Santa Monica Storm Drain Improvement bonds and on the same date $3000.00 City of Santa Monica Bridge Improvement bonds and Turlock Irrigation District bonds sold May 12, $14,800.00. I know of my own knowledge that they were delivered to W. E. Landram. I handled that entirely. On May 13 we purchased some of them back. Well, there was a change. They were not exactly the same bonds, practically all the same but there was a little change. Reading from the entries on our records showing the transaction as of May 13, 1926 there is the following: May 13 City of Santa Monica Sewer Improvement bonds Nos. 27 to 30, inclusive, of $1000.00 each, total $4000.00. Those bonds we sold March 15, 1927 to Price, Fair & Co. The next sheet I have before me from our records shows the following entries with reference to these bonds: City of Los Angeles Electric Plant Bond No. 8625 $1000.00 sold May 20, 1927 for $1000. to Price, Fair & Co. by the First National Bank in Fresno. The next sheet from which I am reading shows: City of Santa Monica Fire Ap-

(Testimony of E. L. R. Trimble.)

paratus Improvement bonds bought May 13, 1926 Nos. 22-27-28 and 29, denominations of $500. each, total $2000.00. Under date of May 23, 1927 the First National Bank in Fresno sold the same to Price, Fair & Co. for $2000.00. The next page shows purchase by us for $1000.00 City of Santa Monica Storm Drain Improvement bonds under date of May 13, 1926 Nos. 27 and 28, denominations of $500.00, total $1000.00; sold May 23, 1927 by our bank to Price, Fair & Co. for $1000.00. The entries on the next sheet from our records show purchase May 13, 1926 by us of City of Los Angeles Water Works bonds Nos. 796, 751, 781, denominations of $1000. each, total $3000.00, sold March 3, 1927 by us to Price, Fair & Co. Other entries from our records show purchase by us on May 13, 1926 of City of Santa Monica Bridge Improvement bonds Nos. 27 to 30 inclusive, denominations of $500. each, total $2000.00 and these were sold March 4, 1927 by us to Price, Fair & Co. for $2000.00. The next sheet shows purchase on May 13, 1926 by us of Turlock Irrigation District bonds Nos. 2057 to 2059 inclusive, 2279 to 2283, 2498 to 2514 inclusive, 268 to 272 inclusive, 274, 277, 280, 1020, 1021, 1022, 1023 in denominations of $400. each, total $14,800; that these were sold April 23, 1927 by us to Price, Fair & Co. for $14,830. But besides these records we have a record from our general ledger. Those entries are as follows: Under date of April 23, 1927 Turlock Irrigation District the account has been credited $14,83[illegible].00. These were the bonds referred to in the bond register and on March 4, 1927 City of Los Angeles $3000.00. The account has been credited with this amount. On the same date City of Santa Monica

(Testimony of H. A. Williams.)

account was credited with $2000.00. These bonds are the ones described in our bond register. The next entry May 24, 1927 City of Santa Monica $1000.00 account has been credited with this amount. May 24, 1927 City of Santa Monica $2000.00 and the account has been credited with this amount. May 24, 1927 City of Los Angeles Electric Plant $1000.00 and the account was credited with this amount. Under date of May 24, 1927 City of Santa Monica $4000.00 account has been credited with this amount. All the bonds that I have last read are the bonds that are referred to in our bond register from which I read a short while ago. These bonds were all payable to bearer—all bearer bonds. At the time I handled these bonds to purchase them during the time we owned them that is, up to about September 25, 1926 I did not know and no one connected with our bank knew so far as I can say that these bonds were claimed by Merced Security Savings Bank of Merced.

CROSS EXAMINATION

There was some correspondence between the plaintiff in this action with our bank concerning these bonds. One letter was from Oakland after we had disposed of them, I cannot remember the exact date of it. We furnished the plaintiff photographic copies of the drafts and matters of that kind in connection with them. The correspondence between us and the Bank of Italy is in our files.

TESTIMONY OF H. A. WILLIAMS

H. A. Williams, a witness called on behalf of plaintiff, after being duly sworn, testified as follows: "I have been engaged in banking for about twenty-five years. At the

(Testimony of H. A. Williams.)

present time I am connected with the First National Bank in Fresno as President and have been such for approximately five years. I knew J. B. Hart in his life time. I recall seeing him in the early part of 1926 in the First National Bank in Fresno concerning certain bonds. The transaction between him and me was as follows: Mr. Hart's bank carried an account with us. He called at the bank at this time—I forget the date—and advised us that their reserves were running low and said they had a pretty good bond account and that it looked like they would have to sell some of their bonds and he wanted to know if we would take them. He figured that in a short time their deposits would again develop and they would be able to re-purchase the bonds; if convenient for us he would like to have us keep this particular batch of bonds intact. I believe that was about all that he said and I said that we were agreeable to taking them. The bank referred to by Mr. Hart was Farmers & Merchants National Bank of Merced. I knew that he was connected with it. I knew that afterwards the bonds came in and were paid for. The details of them I know nothing about. W. E. Landram, the Vice-president of Farmers & Merchants National Bank of Merced brought them in. I had no intimation up to the time of the death of Mr. Hart that these bonds were not the bonds of Farmers & Merchants National Bank or that they were claimed by Merced Security Savings Bank of Merced.

CROSS EXAMINATION.

I had a conversation with Mr. Gallaher and told him that all the information we had of the transaction was available to either and both sides of this case and I as-

(Testimony of F. W. Henderson.)

sured Mr. Gallaher that he could get all the information at any time. The interview I had with Mr. Hart I believe Mr. Vaughn was also present, I think there were the three of us. We paid the face value for the bonds as our account shows. This transaction about the bonds was not simply a holding of those bonds instead of a purchase of them. The transaction was never so construed by us. When Mr. Hart and I talked about this prospective sale of bonds the thing that impressed me particularly was that we agreed to keep this block of bonds intact, if it were not necessary to use them, with the definite statement on Hart's part that as soon as there were funds he expected to take them up and would like to take the same block of bonds. He wanted to dispose of a certain block of bonds and of course we would always before we closed a transaction cover the price." At this juncture the plaintiff rested.

TESTIMONY OF F. W. HENDERSON.

F. W. Henderson was called as a witness on behalf of defendants and after being duly sworn, testified as follows: I live in Merced and know the Merced Security Savings Bank. The relation of attorney and client with that bank extended over a period of probably six or eight years. It was in the nature of an employment covering special services. There was no retainer of any kind. As work was assigned to me I did the work. I worked for them off and on up to the time that the bank was transferred to Bank of Italy, plaintiff in this action. I had nothing to do with the sale and transfer of that bank. After the Bank of Italy took over the Merced Security Savings Bank I have done some work for it. It always

(Testimony of F. W. Henderson.)

had other attorneys. There was no retainer. As I was requested to do work I exercised my own judgment. If I wanted to take up the matter I did so and if not I passed it up. The relation of attorney and client between me and the Bank of Italy with reference to this particular case commenced at the time of the filing of the complaint or shortly before that. I am now City Attorney of Merced. It is a city of the sixth class. I have been in that position somewhere about twenty-two to twenty-four years. I have been conversant with the transactions involving this bond issue. I prepared the Resolution which you showed me, passed by the Board of Trustees of the City of Merced. The signature at the bottom is that of O. A. Turner, Treasurer of the City of Merced." The same was introduced and admitted in evidence and marked Defendant's Exhibit A. "In pursuance of this resolution a suit was brought by the City of Merced against Fidelity and Deposit Company of Maryland, a corporation, and Etta Minerva Hart and George Eganhoff, administrators of the estate of Joseph Byron Hart, also known as J. B. Hart, deceased. I prepared the complaint in that action. The paper that you showed me is a copy of that complaint. At that time J. D. Wood was President of the Board of Trustees." The instrument was offered in evidence and was objected to by plaintiff on the ground that it was incompetent, irrelevant and immaterial and was a matter not involved in this action. The objection was overruled, exception was taken by the plaintiff and the instrument was introduced as Defendant's Exhibit B. The witness was next shown a letter containing a copy of a resolution of the Board of Trustees of the City of Merced

(Testimony of F. W. Henderson.)

written by F. M. Ostrander to Mr. Hilliard, Receiver, he being the Receiver's local attorney, and was offered in evidence. Objection was made to the same by plaintiff on the ground that it was incompetent, irrelevant and immaterial and a matter between parties other than those concerned with the instant action. The objection was overruled and the plaintiff noted an exception. Same was introduced in evidence and marked Defendant's Exhibit C. "So far as that case was concerned it was dismissed. The Fidelity and Deposit Company of Maryland paid to the City of Merced $11,000.00 in cash and subsequent to that time the Bank of Italy paid to the City of Merced the amount that is mentioned in this letter which includes interest, in all $15,047.02. Those payments were made on account of the suit that you have spoken of here that is referred to and also on account of the suit that the City of Merced brought against the Merced Security Savings Bank and which suit involved the balance of the deposit that had been made by J. B. Hart as Treasurer with the Merced Security Savings Bank. This compromise was devised for the purpose of settling both suits referred to and also suits were brought by Merced Security Savings Bank against the City of Merced which involved the bonds in question. The attorneys for the bank were Fred Wood and James F. Peck. I had nothing to do with the bringing of that suit. As soon as it developed that there was adverse interests between the bank and the city I immediately notified the bank that my first duty was to the city and from that time on I acted for the city and Fred Wood and James F. Peck represented the bank until it was taken over by the plaintiff and then Ferrari and

(Testimony of F. W. Henderson.)

Posner were substituted for Wood and Peck. The city of Merced brought an action against the Merced Security Savings Bank to recover from it that part of the $25,000.00 deposited that had not theretofore been repaid. There were four suits in all. The suit brought by the City of Merced against Merced Security Savings Bank was for the balance of the deposit. The complaint filed contained no allegation about the return of bonds which had been put up as security for the deposit. The corres*pn*dence which I have here will show just what the final disposition of the litigation was. This is a letter to Louis Ferrari from the bonding company formally closing the transaction, and this is a letter from Mr. Stevick of the bonding company to me."

Mr. GALLAHER: I think that I will introduce them both in evidence.

MR. HENDERSON: We object on the ground that the same are incompetent, irrelevant and immaterial.

THE COURT: Objection overruled. Mr. Henderson's objection and the two letters are introduced and are marked Defendant's Exhibit E and the following letter was read into the record:

"August 22, 1927.

Mr. F. W. Henderson, Attorney, City of Merced, Merced, California.

Dear Sir: In re J. B. Hart, City Treasurer. 3,080,182-A

I hand you herewith draft for $11,000.00 payment on account of the bond of J. B. Hart, City Treasurer, as per my letter of August 12. Yours very truly, Guy Leroy Stevick, Vice-president Fidelity and Deposit Company of Maryland."

(Testimony of W. C. Freeland.)

(The witness continuing) "All of these matters for the city were handled by me rather than any of its other officers." This letter, dated August 16, 1927 from Fidelity and Deposit Company was received in evidence, marked Defendant's Exhibit H, subject to the general objection heretofore stated and to the exception noted.

(The witness continuing) In connection with this matter I desire to produce as a part of the transaction and in connection with the litigation referred to the demand upon O. A. Turner, as Treasurer made by Merced Security Savings Bank for the bonds involved in this suit. When the demand was presented to the Board of Trustees by the bank, the Board rejected the demand and denied the request. All of these actions that you have referred to (four in number) were dismissed on the consummation of the settlement between the various parties.

TESTIMONY OF W. C. FREELAND.

W. C. Freeland, a witness called on behalf of defendants, being duly sworn, testified as follows: "I am a public accountant of the firm of Burdick & Freeland of Fresno. Prior to that I was in the banking business. I am acquainted with the manner of bookkeeping in banks. I was connected with the First National Bank of Selma and the Selma Savings Bank for 31 years, lacking one month, beginning as a Clerk and all around roustabout, and gradually worked up as business increased, and finally became the presiding officer, passing through the various stages of Clerk, Bookkeeper, Assistant-cashier, Cashier and Manager. I was Manager of the bank for probably 14 years. I made an examination of the books of Farmers

(Testimony of W. C. Freeland.)

& Merchants National Bank of Merced for the purpose of determining the book showing and the actual result of the books showing the transaction between J. B. Hart in whatever capacity he acted in connection with the bonds that I have heard discussed in this suit. I have been able to trace this transaction so as to determine whether the Farmers & Merchants National Bank of Merced received any money or anything of value out of the transaction with reference to these bonds."

Q. From examination of those books and accounts I will ask you whether or not The Farmers & Merchants National Bank did receive or retain anything out of that transaction.

MR. HENDERSON: I object to the question on the ground that it is incompetent, irrelevant and immaterial. This is a matter of whether the Merced Security Savings Bank, the predecessor in interest of the plaintiff, sustained any loss by reason of this transaction rather than whether or not the party who was guilty of the conversion sustained a loss or received any benefit.

THE COURT: Overruled. I suppose you mean financial benefit?

MR. GALLAHER: Yes.

MR. HENDERSON: Exception.

A. It did not.

The witness continuing: "I examined the account of the City of Merced in the defendant bank during the period preceding December 31, 1925. The city's money was then kept in the name of J. B. Hart, Treasurer of the City of Merced."

(Testimony of W. C. Freeland.)

Q. Were you able to determine from that examination of the account whether or not moneys of the City of Merced had been taken from that account by Mr. Hart and appropriated or converted by him prior to the 31st day of December, 1925? A. Yes.

Q. What did you find in that regard?

Mr. Henderson objected to the question as incompetent, irrelevant and immaterial and not presenting any of the issues involved in this action.

THE COURT: Overruled. Exception taken by Mr. Henderson.

A. I found three items that I recall now amounting to $15,000.00 or over in a short period that the city should have received the benefit of and did not.

Q. Now were you able to determine what amount of money was to the credit of the City of Merced on the 11th of February, 1925 in that bank or to the credit of the Treasurer of the City of Merced? A. I was.

Q. What was that amount?

Mr. Henderson objected to the question as incompetent, irrelevant and immaterial. The court overruled the objection and Mr. Henderson noted an exception.

A. The ledger sheet showed a credit of a little over $75,000.00 on the last day of the year, 1925.

THE COURT: To the credit of whom? A. To the credit of J. B. Hart, Treasurer. We examined the records on April 3rd, April 6th and again on October 15th and 17th, 1928. Hart was, according to the bank ledger sheet chargeable with something over $75,000.00 of the city money. I went to the city records to see what they disclosed.

(Testimony of W. C. Freeland.)

Q. You can tell the discrepancy, I guess, if there was any? What did you find?

MR. HENDERSON: Objected to as incompetent, irrelevant and immaterial.

THE COURT: Overruled. Mr. Henderson excepted.

A. The city records showed that there should have been altogether a little over $109,000.00. Now you will need a further explanation to get those figures together if you want to bring that out.

THE COURT: Let me see if I understand. The final deduction from those two would be that there was a shortage in the city fund, the difference between those two amounts?

A. No, not exactly that. The city books showed a balance of a little over $75,000.00 to his credit in the bank as Treasurer.

THE COURT: Then why was not my hypothesis correct? That the result would be that there was a discrepancy or difference between those two figures? A. Well, that is practically correct but the situation is this: That balance of $75,000.00 was not correct. This I determined by subsequent entries made within the next day or two. I stated the credit balance to the account of J. B. Hart, Treasurer, in that bank was a little over $75,000.00; on that same day (December 31, 1925) he had made a deposit of $45,000.00 in the Bank of Italy at Merced which he had taken out of that account so that would make a difference of that much. Then in addition to that he had deposited $25,000.00 in the Merced Security Savings Bank on the same day. To pay that particular deposit now he does not give a check on his

(Testimony of W. C. Freeland.)

Treasurer's account but he has used a draft drawn by his bank on the Federal Reserve Bank in San Francisco for $25,000.00 that the Merced Security Savings Bank received. Then in turn the Merced Security Savings Bank to secure that $25,000.00 as demanded by the law gives Mr. Hart, the Treasurer, $28,300.00 in bonds. No transaction and no items were mentioned in the books in the bank books on the 31st day of December that would give that information but two days subsequent on page 2 then he charges the bond account in that bank with the sum of $28,300.00, increasing the bond account by that much in order to clear that balance and to make a credit for it he credited to the Federal Reserve Bank in San Francisco $25,000., the exact amount he drew on them two days prior but which he did not credit and that left a balance of $3300.00 still unaccounted for that he takes and puts into his own personal account, making out a deposit ticket in his own hand writing. Then that takes care of the transaction up to that point. Then as far as we can ascertain by the books nothing is done with reference to those bonds. The books show no transaction whatever with reference to them. On March 26, 1926 these bonds were taken to the First National Bank in Fresno and somehow disposed of. On March 27, 1926 the books (of the Farmers & Merchants National Bank) show that that bank received from the First National Bank of Fresno a draft for $28,300.00. At least that date is the date on which it was run thru the books of Farmers & Merchants National Bank, then to balance the transaction of the bank receiving the draft the bond account is credited $28,300.00 which clears the charge made January 2, 1926

(Testimony of W. C. Freeland.)

that put the bond account back in the exact relative position that it was before. Then nothing happened again until May 14, 1926. On that date the American Bank in San Francisco is credited with $10,000.00 and the Federal Reserve Bank in San Francisco is credited with $18,000.00 drafts which were drawn several days prior to that according to dates but not entered in the record. Those two items helped to purchase back the bonds from the First National Bank in Fresno and there was a difference of $521.68 that the record show Mr. Landram gave a check for, $300.00 of that being principal to make up the $28,300.00; that check went thru Mr. Landram's personal account. His account was charged that much and he was repaid by a charge in Mr. Hart's own personal account so that in reality J. B. Hart paid that $521.68 out of his own personal account. There was an entry in Mr. Landram's account with the bank showing the withdrawal of that amount from his account.

We have disposed of that second transaction in which was credited $10,000. to the American National Bank and $18,000. entry, the entry being $10,000. to the American National Bank and $18,000. to the Federal Reserve Bank, the counter-balancing entry for that was the receipt of a draft for $27,800. received by the Farmers & Merchants National Bank from the First National Bank in Fresno. That left a difference of $200. which the books do not show where that came from. No entry was made on the bond account at all. There were two sheets covering the J. B. Hart Treasurer account. They were both kept in the files. Here is the spurious sheet (indicating) and this is the genuine. This sheet, marked for identification De-

(Testimony of H. B. McClelland.)

fendant's Exhibit L-1, is the bank sheet as kept in the bank. This paper marked for identification Defendant's Exhibit L-2 showed the correct balance due the City of Merced. These sheets I received from Colonel Hilliard, the Receiver." At this juncture the witness was withdrawn, and

H. B. McCLELLAND,

a witness called on behalf of defendants, after being duly sworn, testified as follows: "Exhibits L-1 and L-2 which you now show me were delivered by Mr. Hilliard to Mr. Freeland in the Farmers & Merchants National Bank in Merced. I was then an employe in the bank, working under Mr. Hilliard. I knew that these papers were in the bank at that time. Shortly after the bank closed Mr. Hilliard engaged Parker & Manners, public accountants, to go over the books of the bank and J. B. Hart's account. It was while they were there that they found these sheets in what we call the file where full sheets and closed-out accounts were filed. I am referring to both sets. There were no other sheets covering the same period of time showing the account between the City Treasurer and the bank. When the bank was in operation we had ledgers that were in use every day that the bookkeepers were posting on every day. When a sheet fills up, of course, they have to make a new sheet to go on with the account. This full sheet is pulled out and filed in a file for future reference or to keep the account intact. If the account is closed out it is taken out of the ledger. Only the live sheets are kept in the ledger. We kept these full sheets of active accounts in a sort of tin file with three or four

(Testimony of W. C. Freeland.)

drawers in it. The posting during this time with the posting machines was done by two bookkeepers, Henry Hall and J. C. Hart, the latter a son of J. B. Hart. I do not know whether J. B. Hart operated a posting machine.

CROSS EXAMINATION

I knew that the City of Merced accounts were kept in our bank by Mr. Hart during the time embraced in these sheets. They were discovered by Parker & Manners. I was in the bank at the time."

At this juncture W. C. Freeland was recalled on behalf of defendant on direct examination and testified as follows:

W. C. FREELAND

Mr. Hart's account as Treasurer of the City of Merced showed a credit balance of $75,664.39 on December 31, 1925. At the close of business on December 30, it shows a balance of $75,664.39; December 29th, $75,446.39; December 26th, $78,719.87; December 23rd, $78,739.87. These figures are taken from Exhibit L-1 which shows the Hart account with the bank. From Exhibit L-2 which shows the account between Hart and the City of Merced it appears that Hart's balance December 31, 1925 was $39,038.80; December 30th, $109,038.80; December 22nd, $108,820.80; December 16th, $109,915.29; December 14th, $111,690.23."

THE COURT: I am going to ask a question which may be objectionable, gentlemen, but if it is I do not want you to waive any objections but I am going to ask it anyhow. What would be the object, in your opinion, of Mr. Hart keeping these two sets of ledger accounts purporting

(Testimony of W. C. Freeland.)

to show the status of his account with the Treasurer in the Farmers & Merchants National Bank?

A. He wanted to show at all times—he wanted to have a sheet he could show at all times to whoever might inquire what should have been the true state of the City of Merced finances.

Q. And he wanted to have another sheet to show the actual condition?

A. No, just the other way around.

Q. It is the other way around the way you look at it? A. Yes.

Q. I cannot quite get the idea of a man who was trying to conceal something keeping a record to disclose it.

A. The bank sheet itself would disclose that—L-1 as we call it, but the other sheet shows the actual conditions as they should have been between him as Treasurer and the City of Merced.

THE COURT: Both of these sheets were kept in the bank? A. Yes, but they needed one to prove up the other bank records and L-1 was the one that proved up with the other bank records and not the other one. If a city official went into the bank and asked the Treasurer to refer to the sheet showing the city's account he would exhibit L-2 and if a national bank examiner went into the bank to discover the true condition he would see only one sheet and he would prove up with L-1. L-2 shows the true condition of J. B. Hart's account as Treasurer of the City of Merced with the city. If a national bank examiner was shown L-1 in my opinion he would take it at its face value as being a correct copy of the ledger. If he had gotten ahold of L-2 he would immediately discover that

(Testimony of Henry P. Hilliard.)

there was a fabrication there in making his comparison with L-1. I went to the city records took a list of the deposits which should have been made during the months of October, November and December, 1925 to see how they harmonized. I found all the credits in L-1 with the exception of three deposits amounting to something over $15,000. which had not been credited in L-1 to J. B. Hart, Treasurer, in L-2. They were in agreement as to amounts, slightly different sometimes as to date. Two fairly large size items we tried to check up but could not find where they went. Another item, something over $7000., that the City of Merced or J. B. Hart account should have had credit for was placed directly in his personal account. I determined from the examination of these accounts that Hart had appropriated to his own use of the funds of the city on or about December 31, 1925, $34.000.*oo*.

HENRY P. HILLIARD,

a witness called on behalf of defendants, testified as follows:

I am the Receiver of the Farmers & Merchants National Bank, now in the process of liquidation, and with the Bank a defendant in this case.

It is here stipulated between counsel that there are approximately 2500 depositors of the defunct bank, that there has already been an assessment made and collected of $100. a share on the stock liability, and that the debts of the corporation will be paid to the extent of about fifty cents on the dollar, and that there will be nothing to distribute to officers or stockholders.

(Testimony of E. L. Trimble.)

E. L. TRIMBLE,

a witness produced by plaintiff, recalled for further cross-examination, testified as follows:

The letter of which you (Mr. Gallaher) now shows you is the letter upon which I gave the plaintiff the information transmitted by letter to Mr. Hart concerning the bond transactions with our Bank.

The letter was introduced in evidence by defendants and marked Defendants' Exhibit "K".

Our Bank did transmit interest coupons detached from these various bonds to the Farmers & Merchants National Bank at Merced. This was in conformity to a letter received from the Bank signed by Mr. Hart, its President.

Vaughn before coming to the First National Bank in Fresno in September, 1923, was a National Bank Examiner. I knew that the First National Bank in Fresno while Vaughn was cashier was making loans to J. B. Hart. I knew that the matter of the making of the loan was discussed with some one else in the Bank other than Mr. Vaughn. I don't remember who it was. I believe Mr. Hart had a statement of his resources and liabilities on file in this Bank and this loan was made on the strength of that statement. It proved to be a bad loan afterwards and it was written off. I think it was for $2500. I don't recall about when it was that the loan was made.

A RE-DIRECT EXAMINATION.

The Farmers & Merchants National Bank of Merced carried a credit account with us. It was never a very large account and balance would run around perhaps $15,000. I am not able to say what the condition of that account was at the time the bonds were sold to us. I

(Testimony of E. L. Trimble.)
attended personally to the clipping of the coupons from the bonds.

"The Court: How did you come to do that, what arrangements were made as to that, if any?"

"A. The only way that I understood it was that we took these bonds in at the par value and never figured the accrued interest at the time it was put on the books, and when we clipped the coupons Mr. Hart as President of the Bank said he would pay us the interest on them and he would like to have the coupons; that was my understanding."

In return for the coupons our Bank received from Merced a check for an amount of money. What it was I don't remember. It would be the proportionate part of the interest from the time that we received the bonds in the First National Bank in Fresno to the last due date of the interest payments. There was no account ever taken in our Bank of the accrued interest due on these bonds up to May 11, 1926. I don't know why it was not calculated at the time of the transfer any more than Mr. Vaughn said we purchased these bonds at par value and we paid the par value for the bonds. The par value of these bonds was practically the market value.

"The Court: I could not quite get from Mr. Trimble the reason for a Bank sending the coupons to Merced if the transaction was an account and account sale."

"A. Well, that was my understanding of it. There was a letter transmitted to Mr. Hart to the Farmers & Merchants National Bank, one that I endeavored to find this morning, stating that these bonds were an outright purchase, but Mr. Hart had suggested that if we could

(Testimony of E. L. Trimble.)

hold them intact and if they were all right for our files, were the kind of bonds we wanted, I might want to repurchase them, but our letter to the Farmers & Merchants Bank was we were buying these bonds outright and there is a copy of that letter in our files. I know that, because I saw the letter. After Hart committed suicide Vaughn got the correspondence out and took the matter up with our attorney to see that they were bearer bonds, and we had purchased them as bearer bonds and that we were absolutely clear in the transaction and the letter was on his desk. I have been endeavoring to locate that letter with the other. So far I have been unable to do so, but I know there was a letter transmitted to the Farmers & Merchants National Bank setting out that these bonds were purchased."

Mr. Gallaher continued with the cross-examination when the witness was recalled.

Three letters were produced by him and were introduced in evidence by defendants under the objection of plaintiff that they were incompetent, irrelevant and immaterial, and an exception being taken to the order of the Court admitting them, and they were marked Defendants' Exhibit "M."

The witness also produced a note for $2500., dated July 27, 1926, signed by J. B. Hart, which was a renewal note of the loan originally made January 19, 1926, in the sum of $3500., upon which $1000. had been paid. These with the attached financial statement of Hart were admitted in evidence and marked Defendants' Exhibit "N."

(Testimony of W. C. Freeland.)

CROSS-EXAMINATION OF W. C. FREELAND.

We did not find any withdrawals from Hart's treasurer's account Exhibit L-1 which should not have been made. We found a number of deposits which he made in the account which should not have been there. They came from his personal account at times. Some of the deposits we could not trace. Other deposits which we traced came direct from his personal account to build up the balance belonging to the City in order to pay warrants as they came in. I found also that he withdrew from the City account, as shown by L-1 funds to replenish his own personal account in the Farmers & Merchants National Bank. I could not say from my examination how much that amounted to in the year 1925. There were so many transactions in which he would attempt to repay some of the money in order to pay City warrants that one would have to make an exact examination and have exact date in order to tell how things stood there. When the proceeds of the drafts that were delivered to the Farmers & Merchants National Bank by the First National Bank in Fresno were credited to the account of the Farmers & Merchants National Bank in its correspondents Banks in San Francisco, that in my opinion would constitute an asset of the Farmers & Merchants National Bank. Those drafts were entered to the credit of the Farmers & Merchants National Bank in its correspondents Banks in San Francisco. Those credits I would recognize as assets of the Farmers & Merchants National Bank.

"MR. PEART: I move to strike out the last answer and object to the question. It is simply a question of what the books show. Apparently it is his opinion that is re-

(Testimony of Henry P. Hilliard—Guy Leroy Stevick.)

quested as to whether this witness would recognize this item as entered."

"THE COURT: I don't think it is his opinion. I think perhaps it is a misnomer. I think that instead of assets it would be a credit. He did find something in the beginning to show that to be a credit of the Farmers & Merchant National Bank."

"A. Yes sir."

"THE COURT: Motion is denied."

"MR. PEART: Exception."

HENRY P. HILLIARD

recalled on behalf of defendants.

When I took charge of the assets of the Farmers & Merchants National Bank of Merced I did not find any account between the Bank and N. D. Vaughn. He had a note there. The amount due thereon at the time the Bank closed was $3500. Subsequently I collected it.

"MR. PEART: We now offer these accounts L-1 and L-2, previously marked for identification in evidence."

"MR. HENDERSON: We object on the ground that they are incompetent, irrelevant and immaterial."

"THE COURT: Overruled."

"MR. HENDERSON: Exception."

Whereupon the accounts were admitted in evidence and marked Exhibits "L-1" and "L-2."

GUY LEROY STEVICK.

After the order submitting the case upon briefs, made by said Court, upon the conclusion of the production of testimony by the parties to said action on October 25,

(Testimony of Guy Leroy Stevick.)

1928, upon motion of defendants, the Court made an order re-opening the case for the purpose of taking the deposition of Guy Leroy Stevick in San Francisco, California, and of the Manager of the branch bank of plaintiff corporation located in the City of Merced, County of Merced, State of California, and that pursuant to said last mentioned amendment the following stipulation was made and entered into by and between counsel representing the respective parties in the above case, and was subsequently filed with the records of the above case:

"IT IS HEREBY STIPULATED by and between the plaintiff in the above-entitled action and the defendants therein that, pursuant to letter of Guy Leroy Stevick, Vice-President of the Fidelity & Deposit Company of Maryland, to Mr. Louis Ferrari, Vice-President of the Bank of Italy at San Francisco, the said plaintiff received from the said Bonding Company, pursuant to paragraph III of said letter, which is defendants' Exhibit E in the above case, the sum of $15,047.02; and

IT IS FURTHER STIPULATED that this stipulation may be filed in the above-entitled action and with the deposition of Guy Leroy Stevick, heretofore taken as ordered by said Court, considered by the Court in arriving at its judgment in said action."

and by stipulation of the parties the deposition was subsequently taken July 11, 1929. At that time he was called as a witness on behalf of defendants, and after being duly sworn, testified as follows:

I am the Vice-President of Fidelity and Deposit Company of Maryland and have been such for about 35 years. My Company was on the official bond of J. B. Hart as

(Testimony of Guy Leroy Stevick.)

Treasurer of the City of Merced, California, in the sum of $40,000. Claims were presented to the Company upon that bond by the City of Merced. I understood that Hart as Treasurer had made a deposit of moneys of the City of Merced with the Merced Security Savings Bank of Merced. Certain actions were brought in relation to that deposit and to the acts of J. B. Hart along in and prior to August 1927. There were two suits, one brought by the City of Merced against us on the bond in which they claimed some $11,000 defalcations and another item of about $3,000. on warrants, another item of about $2500. or $3000. and another item being the deposit of the City in the Merced Security Savings Bank amounting to about $15,000. with interest. There was also a suit brought against us by the Bank of Italy as successor of Merced Security Savings Bank for about $28,000., being the value of certain securities which were alleged to have been delivered by the Savings Bank mentioned to Hart, the Bank of Italy having succeeded to the interest of the Savings Bank in the matter.

I have read the copy of the letter set out on pages 4 & 5 of Mr. Gallaher's affidavit. I wrote that letter. It is correct.

Paragraph 3 thereof reads as follows: "We will pay to you (Bank of Italy) the amount of the City's deposit and interest upon it at the rate agreed to be paid by your Bank (this amount to be paid by you to the City)." I signed that letter as Vice-President of the Company and addressed it to Louis Ferrari as Vice-President of the Bank of Italy. The letter referred to and set out by copy in the affidavit presented to the witness is as follows:

(Testimony of Guy Leroy Stevick.)

"FIDELITY AND DEPOSIT COMPANY

(Letterhead)

August 12, 1927

"Mr. Louis Ferrari,
Vice President,
Bank of Italy,
San Francisco.

In re J. B. HART.

Dear Sir:

I beg to confirm the terms of settlement of claims against us under the above bond, to wit:

1. We will pay to the City of Merced, the sum of $11,000.

2. We agree to hold the City of Merced harmless from the claim of the Receiver based upon certain warrants aggregating $3,027.62.

3. We will pay to you the amount of the City's deposit and interest upon it at the rate agreed to be paid by your bank (This amount to be paid by you to the City).

4. We will pay to you further the sum of $5,500. and will agree also to pay you one-half of any saving which we may make on the claim of the Receiver against the City. It is to be understood, however, that we reserve the right to pay that claim in full, or to make any adjustment we think best.

5. We understand you will at once bring suit against the Receiver of the Farmers & Merchants Bank for the value of the bonds missappropriated by that bank, and that in consideration of the payments made to you you will, if successful, pay to us one-half of the net proceeds of

(Testimony of Guy Leroy Stevick.)

that suit after deducting all costs, expenses and attorneys fees. In case either you or we are reimbursed in full for any loss then the other party shall be entitled to the balance of the net proceeds until it is fully reimbursed.

I am sending a copy of this letter to Mr. Henderson, and *he if* and you advise that this is satisfactory we will make payment forthwith.

Yours very truly,

(signed) Guy LeRoy Stevick,

Vice-President."

Pursuant to that letter, the Fidelity and Deposit Company of Maryland paid to the Bank of Italy $15,047.02, being the amount of the deposit of the City of Merced with the Bank, which amount was to be paid over and was paid by the Bank to the City. We also paid the Bank the sum of $5500., which was an agreed amount in consideration of which the Bank was to do the things referred to in the letter under paragraph 3. The amount of $15,047.02. included accrued interest in the sum of $469.57. I received from Mr. Henderson, City Attorney, and from Mr. Wood, President of the Board of Trustees of Merced, a receipt for $15,047.02, being the balance of the City deposit made by Mr. Hart while he was City Treasurer of said City. I will read it into the record:

"In the Superior Court of the County of Merced, State of California.

City of Merced, a body politic, and corporate, Plaintiff, against Merced Security Savings Bank of Merced, Defendant.

"Receipt in full settlement of all claims.

(Testimony of Guy Leroy Stevick.)

"This is to acknowledge payment by Bank of Italy National Trust & Savings Association, Successor to the Bank of Italy, which acquired by purchase the property of said defendant, and assumed all obligations owing by it, and particularly the one involved in the above entitled action, the sum of $15,047.02, being the balance of the said deposit made by J. B. Hart while and as City Treasurer of said City in said defendant Bank of said fund, together with interest upon the daily balance of said deposit at the rate of 2-½% per annum.

"This receipt is executed in conformity to a resolution of the Board of Trustees of the City of Merced, heretofore duly adopted by said Board, empowering the undersigned to execute the same on behalf of the said City, and to accept said amount in settlement of said claim.

"Dated August 23rd, 1927.

"(Signed) J. D. Wood,
"President of the Board of Trustees.
"F. W. Henderson, City Attorney and
Attorney for plaintiff in said action."

I also received a receipt from the City of Merced for the additional sum of $11,000. at the same time. The draft for $15,047.02 was payable to the Bank of Italy. It was paid in accordance with the 3rd paragraph to the Bank, this amount to be paid by the Bank to the City, and it was so paid. The Bank of Italy paid in a single draft which included the two sums, $15,047.02 and $5500. There was also paid $11,000. to the City, I may say, in accordance with the 2nd paragraph of my letter. We have also since paid to the City the amount of the claim referred to in that section. The receipt which I have read

(Testimony of Guy Leroy Stevick.)

into the record for the sum of $15,047.02 from the Bank of Italy National Association was signed by Mr. Henderson in compliance with the quoted section of paragraph 3 of my letter and contained in brackets which I read. "This amount to be paid by you to the City?" It was thought that it would be clearer to have that amount passed through the Bank to the City, rather than to have us pay it directly to the City, and it was so paid. By making the payment in that way, the books of the Bank showed that the account was balanced. Upon that payment being made by my company the two actions in which it was a party were dismissed and also in accordance with that another suit was begun by the Bank of Italy on behalf of it and of our company against the Farmers & Merchants National Bank and its Receiver. In that action this deposition is now being taken.

CROSS-EXAMINATION

The original deposit of the City of Merced in the Merced Security Savings Bank was $25,000.00. The amount of that deposit was reduced to the sum of $14,577.45 to which we added the accrued interest of $469.57. My company was on Hart's bond to the extent of $40,000.00. Suit was brought on that bond against my company and one of the items of recovery was that balance of the original deposit, to wit, the sum of $14,000.00. The city claimed we were liable for the balance of that deposit in the bank on account of our being on Hart's bond. It also claimed $11,000.00 on another account from us. That suit was adjusted in that settlement. We paid $11,000.00 to the city and then drew a check for $20,000.00 plus in favor of the Bank of Italy to pay the amount of the deposit to

(Testimony of Guy Leroy Stevick.)

the city. We thereupon filed a claim against the estate of J. B. Hart, deceased, which I understand has been allowed and has never been paid. The total of the suits brought by the city and by the Bank of Italy exceeded the amount of our bond and we pleaded the defense against the suit by the bank on the ground that it had no right of action under our bond but there was a dispute on the legal question involved in that defense. The adjustment which I made tried to take care of all legal obligations to the city on our bond and left the Bank of Italy to bring suit against the Farmers & Merchants National Bank for the misappropriation of the bonds which had been deposited by the Merced Security Savings Bank with Hart and provided for the division of the proceeds of that suit between the Bank of Italy and ourselves up until either one of us was satisfied with respect to our claims.

RE-DIRECT EXAMINATION.

We forwarded this draft to the Bank of Italy about August 23rd, 1927. That is the date on which I reported the drawing of this draft to the home office of the company.

The foregoing was all of the evidence in the case, other than the exhibits that have been identified hereinbefore by reference to numbers and letters and which have been set out, that to the extent that the same are material. The testimony of the witnesses as set out herein gives the material portions. The plaintiff and defendants both rested and the plaintiff thereupon made the following motion; that judgment in said action be entered in favor of plaintiff and against defendants for the sum of $28,000. and for its costs of suit herein, and that said Court adjudge

(Testimony of Guy Leroy Stevick.)

and decree that the claim of said plaintiff against defendant is a valid claim and direct that said Receiver certify the same as a valid claim against defendants to the Comptroller of Currency of the United States, to be paid by him in the due course of the liquidation of said Bank, together with its costs of suit herein incurred, and the said plaintiff thereupon reserved an exception to any judgment made by said Court not in accordance with said motion; thereupon the cause was submitted to the Court for decision upon briefs thereafter to be filed. Subsequently the Court in the absence of the parties filed a memorandum opinion in the case and therein ordered that findings and judgment be prepared by counsel for the plaintiff and that plaintiff have judgment against defendants according to the prayer of its complaint less the sum of $5500. and an additional sum of $15,047.02, for which amounts credit must be given in such findings and judgment; that thereafter counsel for plaintiff reserved its exception to the said order and the findings and judgment so to be prepared, did prepare the proposed findings of fact and judgment and did in open Court on January 18, 1930, move the Court for judgment in favor of plaintiff, establishing its claim as a preferred claim against said defendants for the sum of $27,800., the value of the bonds alleged to have been converted, which motion was denied by said Court, an exception thereto taken by plaintiff, and thereafterwards on January 29th, 1930, findings and judgment were adopted, signed and filed by said Court, which findings and judgment are for judgment against defendants in favor of plaintiff for the sum of $6789.74 and costs of suit.

The Court: "The record may show that either party may have an exception reserved on the record to every adverse ruling made now or hereafter."

Come now the plaintiff, and within the time allowed by law, presents this, its Bill of Exceptions herein, and prays that the same may be settled and allowed.

Louis Ferrari,
J. J. Posner
F. W. Henderson
Attorneys for Plaintiff.

IT IS STIPULATED that the foregoing Bill of Exceptions may be settled and approved, the same having been corrected in accordance with the agreement of said parties.

Louis Ferrari,
J. J. Posner
F. W. Henderson
Attorneys for Plaintiff.

Hartley F. Peart
Gallaher & Jertberg
Attorneys for Defendants.

The above and foregoing statement is hereby approved and settled.

Dated, March 3rd, 1930.

Paul J. McCormick
United States District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA— NORTHERN DIVISION.

- - - - -

BANK OF ITALY NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Plaintiff, : No. 367-J. Civil

vs. AFFIDAVIT OF MAILING BILL

THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED, a national banking association, and HENRY P. HILLJARD, as Receiver thereof, : OF EXCEPTIONS

Defendants.

- - - - - - - - - - -

STATE OF CALIFORNIA, :
: ss.
COUNTY OF MERCED. :

Ellen F. Hughes, being duly sworn, deposes and says: That she is a clerk in the office of F. W. Henderson, attorney at law, attorney for plaintiff in the above entitled action; that said F. W. Henderson resides in and has his office in the City of Merced, County of Merced, State of California; that Messrs. Hartley F. Peart and Gallaher & Jertberg are the attorneys of record for the above named defendants in said cause; that the said Hartley F. Peart has his offices in the City and County of San Francisco, State of California; that Gallaher & Jertberg have their offices in the City of Fresno, County of Fresno, State

of California and none of said attorneys for defendants reside in or have their offices in the County of Merced; that in each of said three places there is a United States Postoffice and between said City of Merced and said City and County of San Francisco, and between said city of Merced and said City of Fresno there is a regular daily communication by mail;

That on the 6th day of February, 1930 deponent served the annexed bill of exceptions in said action on said attorneys for defendants by depositing a true and correct copy of said bill of exceptions on said day in the postoffice at said City of Merced, properly enclosed in an envelope, addressed to said Gallaher & Jertberg, attorneys at law, Brix Building, Fresno, California, their said place of business, and prepaid the postage thereon.

Ellen F. Hughes

Subscribed and sworn to before me this 6th day of February, 1930.

[Seal] F. W. Henderson
Notary Public in and for the County of Merced, State of California.

[Endorsed]: Lodged Feb. 7, 1930. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

Filed Mar. 3, 1930. R. S. Zimmerman Clerk By Louis J. Somers, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

No. 357-J. Civil.

PETITION FOR APPEAL.

To the Honorable PAUL J. McCORMICK, District Judge:

The above named plaintiff, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 29th day of Jan., 1930, does hereby appeal from said decree to the Circuit Court of Appeals, for the Ninth Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and it does pray that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such Court in such cases made and provided, and your petitioner further prays that the proper orders relating to the required security to be required of it be made.

Dated, February 7th, 1930.

Louis Ferrari
J. J. Posner
F. W. Henderson
Attorneys for Plaintiff and Appellant.

Appeal as prayed for is allowed and bond thereon fixed in the amount of $500.00

Paul J. McCormick
U. S. DISTRICT JUDGE

[Endorsed]: Filed Feb 7, 1930. R. S. Zimmerman Clerk By Edmund L. Smith Deputy Clerk

[TITLE OF COURT AND CAUSE.]

No. 357-J.

ASSIGNMENT OF ERRORS.

Comes now the plaintiff in said cause and files the following assignment of errors upon which it will rely on its prosecution of appeal in the above-entitled action from a judgment entered by said Court on the 28th day of January, 1930:

1. The Court erred in overruling plaintiff's motion for judgment in its favor against defendants in accordance with the prayer of its complaint and for the amount mentioned therein.

2. The Court erred in crediting defendants with the amounts paid by FIDELITY AND DEPOSIT COMPANY OF MARYLAND to the plaintiff, and reducing the amount of the judgment to which plaintiff was entitled and for which it moved by those amounts.

3. The Court erred in ordering judgment in favor of plaintiff and against defendants for no more than the sum of $6789.74.

4. The Court erred in adopting and signing the proposed findings of fact in the above cause so far as the same reduced the amount to which plaintiff was entitled and credited defendants with the payments made by FIDELITY AND DEPOSIT COMPANY OF MARYLAND to plaintiff.

WHEREFORE, plaintiff prays that the aforesaid judgment in the United States District Court be modified and changed, so that judgment be rendered and entered in favor of plaintiff against defendants for the full amount

prayed for, to-wit, $27,800. and costs of suit, and that the same be established as a preferred claim and paid in full by said defendants in the process of liquidation of said defendant Bank.

Dated, February 6th, 1930.

Louis Ferrari,
J. J. Posner
F. W. Henderson.
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 7, 1930. R. S. Zimmerman Clerk. By Edmund L. Smith Deputy Clerk

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[Title of Court and Cause.]

No. 357-J. Civil.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, BANK OF ITALY NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation, as surety, are held and firmly bound unto the defendants in the above-entitled cause in the sum of FIVE HUNDRED AND 00/100 - - - - - - - - - - - - DOLLARS ($500.00 - -) to be paid to said defendants, its successor or assigns, for which payment well and truly to be made the undersigned bind ourselves, and each of our successors and assigns, jointly and severally, by *the* these presents.

SEALED with our seals this 10th day of FEBRUARY 1930.

WHEREAS, the above-named plaintiff has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to correct the judgment of the District Court of the United States, in and for the Southern District of California, Northern Division, heretofore made, given and rendered in the above-entitled cause in favor of plaintiff and against said defendants.

NOW, THEREFORE, the condition of this obligation is such that if the above-named plaintiff shall prosecute this said appeal to effect and answer all damages and costs if it fails to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

BANK OF ITALY NATIONAL TRUST AND SAVINGS ASSOCIATION,

By B. Fancher

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By J. R. Cornett

[Seal] Its Attorney-in-fact.

STATE OF CALIFORNIA,)
County of Merced.)

On this 10th day of February, 1930, before me, the undersigned, a NOTARY PUBLIC, in and for the County of Merced, State of California, duly commissioned and sworn, personally appeared J. R. CORNETT, known to me to be the duly authorized attorney-in-fact of FIDELITY & DEPOSIT COMPANY OF MARYLAND, a corporation, and the same person whose name is sub-

scribed to the within instrument as the attorney-in-fact of said Company, and the said J. R. CORNETT acknowledged to me that he subscribed the name of FIDELITY AND DEPOSIT COMPANY OF MARYLAND thereto as principal, and his own name as attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] Ellen F. Hughes
NOTARY PUBLIC, in and for the County of Merced, State of California.

The within Bond approved February 12th, 1930.
Paul J. McCormick
JUDGE.

[Endorsed]: Filed Feb. 12, 1930 R. S. Zimmerman Clerk By M. L. Gaines Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

No. 357-J.

STIPULATION.

IT IS HEREBY STIPULATED that all of the original exhibits introduced and filed in said action upon the trial thereof, in the District Court of the United States, in and for the Southern District of California, Northern Division, may be transmitted by the Clerk of said Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and that the same may be used by said United States Circuit Court of Appeals for all purposes which the same might have been used had

they been incorporated in and made a part of the Bill of Exceptions and also by the respective parties in the preparation of their briefs and upon argument upon appeal.

Dated, March 3rd, 1930.

Louis Ferrari,
J. J. Posner and
F. W. Henderson,
Attorneys for Appellant.
Hartley F. Peart
Gallaher & Jertberg
Attorneys for Appellees.

[Endorsed]: Filed Mar 13 1930 R. S. Zimmerman, Clerk. By M. L. Gaines Deputy Clerk

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[Title of Court and Cause.]

Civil No. 357-J

ORDER FOR TRANSMISSION OF ORIGINAL EXHIBITS

It appearing to the court that heretofore the parties to the above entitled action have in writing stipulated that all of the original exhibits introduced and filed in said action upon the trial thereof should be transmitted by the Clerk of the said court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit for use by the said court upon the appeal taken to it from the judgment of this court in said action, and this court being of the opinion that said original papers should be inspected in said United States Circuit Court of Appeals for the Ninth Circuit upon appeal.

IT IS HEREBY ORDERED that all of said original exhibits be transmitted by the Clerk of this court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, by United States mail and that the same be entrusted to said Clerk of said court for safe keeping and that upon the final determination of said appeal said original exhibits be returned by him to the Clerk of this court by registered United States mail.

Dated, March 13, 1930.

Wm. P. James

Judge of the District Court of the United States in and for the Southern District of California, Northern Division.

[Endorsed]: Filed Mar 13 1930 R. S. Zimmerman, Clerk By M. L. Gaines Deputy Clerk.

[Title of Court and Cause.]

No. 357-J Civil.

STIPULATION AND ORDER RE PRINTING TRANSCRIPT.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective attorneys of record, that in printing the transcript of record on appeal herein, the "Title of Court and Cause" may be used in lieu and stead of the full title, and that the full endorsement of the Clerk of the filing of pleadings, papers and other formal matters may be omitted, and in lieu thereof a statement shall be made that the document is filed, the date thereof and the signature of the Clerk. In

each instance the pleading and document so printed shall be identified by the number in the Court below of this action, to-wit: 357-J. Civil.

Dated: this 10th day of February, 1930.

Louis Ferrari,
J. J. Posner and
F. W. Henderson,
Attorneys for Plaintiff.

Hartley F. Peart
Gallaher & Jertberg
Attorneys for Defendants.

SO ORDERED.

Paul J. McCormick
UNITED STATES DISTRICT JUDGE.

[Endorsed]: Filed Feb. 12, 1930. R. S. Zimmerman Clerk By M. L. Gaines Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

CIVIL No. 357-J

PRAECIPE.

TO THE CLERK OF SAID COURT:

YOU ARE REQUESTED to take a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause and to include in such transcript of record the following and no other papers or exhibits, to wit:

1. Citation on appeal;

2. Complaint;
3. Petition for removal of cause from Superior Court of Merced County to the District Court of the United States for the Southern District of California, Northern Division;
4. Order for removal of cause from said Superior Court;
5. Answer;
6. Written stipulation waiving jury;
7. Motion for judgment;
8. Memorandum of Decision;
9. Addenda to decision;
10. Minute order for judgment made May 2, 1929;
11. Findings of fact and conclusions of law presented upon order of May 2, 1929;
12. Exceptions to said findings;
13. Notice of motion to re-open case and affidavit on;
14. Order re-opening case, dated June 28, 1929;
15. Minute order for judgment, dated August 21, 1929;
16. Findings of fact filed January 29th, 1930;
17. Judgment;
18. Bill of exceptions;
19. Petition for appeal;
20. Order allowing appeal;
21. Assignment of errors;
22. Stipulation regarding exhibits;
23. Order for forwarding of exhibits;
24. Bond on appeal;

25. Stipulation and order in re printing transcript;
26. Praecipe.

Respectfully,
Louis Ferrari
J. J. Posner and
F. W. Henderson
Attorneys for plaintiff and Appellant.

Dated, March 12th, 1930.

IT IS HEREBY STIPULATED that no other papers or exhibits need be included in the transcript referred to in the foregoing praecipe other than those mentioned therein.

Hartley F. Peart
Gallaher &
Jertberg.
Attorneys for defendants and Appellees.

[Endorsed]: Filed Mar. 17, 1930. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 115 pages, numbered from 1 to 115 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; complaint; petition for removal; order for removal; answer, stipulation waiving jury; motion for judgment; memorandum of decision; addenda to memorandum; minute order; findings of fact and conclusions of law; exceptions to findings of fact and conclusions of law; notice of motion to reopen case for purpose of taking depositions; order reopening case; minute order for judgment; findings of fact and conclusions of law; judgment; bill of exceptions; petition for appeal; order allowing appeal; assignment of errors; bond on appeal; stipulation regarding appeal; order for transmission of original exhibits; stipulation and order re printing transcript and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Northern Division, this..... day of March, in the year of Our Lord One Thousand Nine Hundred and Twenty-nine, and of our Independence the One Hundred and Fifty-fourth.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Bank of Italy National Trust and Savings Association, a national banking association,

Appellant,

vs.

The Farmers and Merchants National Bank of Merced, a national banking association, and Henry P. Hilliard, as Receiver thereof,

Appellees.

APPELLANT'S OPENING BRIEF.

F. W. Henderson,
Louis Ferrari and
J. J. Posner,
Attorneys for Appellant.
Merced, California.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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IN THE

United States

Circuit Court of Appeals,

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Bank of Italy National Trust and Savings Association, a national banking association,

Appellant,

vs.

The Farmers and Merchants National Bank of Merced, a national banking association, and Henry P. Hilliard, as Receiver thereof,

Appellees.

APPELLANT'S OPENING BRIEF.

INTRODUCTORY STATEMENT.

The essential facts involved in this litigation are clearly set forth in the opinion or memorandum of decision with the supplement thereto as prepared and filed by the trial judge. The opinion and supplement are shown at pages 21 and 29 of the record. For convenience we have, however, attached copies of both to this brief as an appendix.

The action was for damages for the conversion by the appellee, The Farmers and Merchants National Bank

of Merced, of personal property consisting of bonds and securities belonging at the time of the conversion to the Merced Security Savings Bank, the assignor of plaintiff. For convenience we will refer, in this brief, as was done in the opinion of the trial court, to the owner of these bonds and securities as the Savings Bank, and will refer to the alleged wrongdoer as the National Bank. These bonds and securities, with the interest thereon, were, at the time of the conversion, of the value of approximately $28,000.00.

At all times involved in the litigation and up to September 20, 1926, one J. B. Hart was city treasurer of the city of Merced, a municipal corporation. He was also president and active manager of the National Bank. He transacted all his business, both as city treasurer and as bank president and manager in the same office in the bank premises. Not long prior to December 31st, 1925, the Savings Bank, assignor of plaintiff and appellant, made application to Hart, as city treasurer, to obtain a deposit of $25,000.00 of city funds. This was done pursuant to the terms of a statute of the state of California (Statutes 1923, page 25). Under the provisions of this statute the Savings Bank, upon receiving the $25,000.00 deposit of city moneys, was required to deposit with Hart, as city treasurer, securities ten per cent in excess of the deposit. On December 31st, 1925, this transaction between the Savings Bank and Hart, as city treasurer, was consummated. The bank received $25,000.00 of city funds on general deposit and delivered to Hart securities consisting principally of municipal bonds of the value of $28,000.00.

All the facts recited were found by the trial court to be true and are set forth in the opinion or memorandum of decision written by the learned trial judge. From this portion of the findings no appeal has been taken by either party.

Likewise unquestioned on this appeal are the further findings of the trial court that between December 31st, 1925, the date of the deposit and placing of the securities of the Savings Bank with Hart, as city treasurer, and September 20th, 1926, Hart delivered the possession of said bonds and securities to the National Bank and that on May 13th, 1926, the National Bank sold and converted said bonds of the Savings Bank and appropriated the proceeds thereof to its own use, to the damage of the Savings Bank in the sum of $28,000.00.

The court further found that the sale and conversion of the bonds were not made in connection with the deposit of public funds in the Savings Bank and were not dependent upon or connected therewith in any way whatever.

Still further findings of the trial court are that the conversion of the bonds was unknown to the Savings Bank or to its successor, plaintiff herein, and was not discovered until subsequent to September 20th, 1926, at which time the National Bank went into liquidation and the defendant receiver was named by the comptroller.

It was the contention of the defendants that the National Bank did not convert the bonds in question. It was claimed that Hart, as agent of the National Bank, never received or converted the bonds, but that his wrongdoing was personal, or as city treasurer, and was not

imputable to the National Bank of which he was president and active manager. Concerning this contention the court [Record p. 24] found:

> "The correspondence of Hart as the National Bank president as well as the books and records of the National Bank and specifically the entries therein concerning the bonds alleged to have been converted, clearly show that Hart was the agent of defendant National Bank in dealing with the securities in suit and that the conversion of the bonds of the Savings Bank admittedly made by Hart is chargeable to the National Bank as his principal. These records represent that the National Bank was the owner of the securities. The city could not be held chargeable for Hart's keeping, management and disposal of the bonds under the applicable California statutes. (Sec. 8, Cal. Stat. 1923, p. 25.) It is contended that the National Bank should not be held accountable for the conversion and loss of the securities of the Savings Bank because the evidence fails to show that the National Bank profited by the irregularities and dishonesty of Hart in converting these securities. I cannot agree with this contention. The record is clear that the assets of the National Bank were preserved and enhanced by its president's transactions concerning these bonds with the First National Bank in Fresno. The transactions were apparently regular and within the apparent lawful and customary duties of an officer of a National Bank and inured to the benefit of the National Bank. See *Campbell v. Mfg. Nat. Bank,* 91 Am. State Rep. 438; *First Nat. Bank v. Town of Millford,* 36 Conn. 93; *Bennett v. Judson,* 21 N. Y. 238; *U. S. v. Pan Am. Pet. Co.,* 24 Fed. 2nd 209. It is also clear that the Savings Bank sustained detriment and money damage because of the conversion. It has lost its bonds. Its damage is the market value of them. Under such circumstances the responsibility of the National Bank and the right of *recovery* in the Savings Bank is clear.

> "The defendant has cited many cases, of which *School Dist. of City of Sedalia, Mo., v. DeWeese,* 100 Fed. 705, is typical. I do not regard these authorities as in point here. In all of them, it appeared and was so held that the agent of the bank was acting in his individual capacity or at least was not acting within the apparent scope of his authority as the bank's agent. In the case at bar, however, I have already adverted to the clarity of the evidence that showed the transactions of Hart with the bonds in question to have been those of the National Bank. These facts clearly distinguish the case cited by defendant."

As we understand it, none of the foregoing facts or conclusions are disputed on this appeal. The defendants in the action have not appealed from the decision of the trial court, and the appellant has no fault to find with the findings and conclusions of the trial judge covering the matters which we have so far recited. It will be unnecessary, therefore, even to refer to the evidence up to this point.

On September 28th, 1926, Hart, the city treasurer and president of the National Bank, committed suicide under sensational circumstances. It was immediately discovered that he had been guilty of a long series of defalcations and irregularities as city treasurer of the city of Merced, and in other capacities. One of these defalcations consisted of the conversion of the bonds and securities placed with him by the Savings Bank. As city treasurer Hart was bonded by the Fidelity and Deposit Company of Maryland.

After the death of Hart and the collapse of the National Bank, and at the time of the discovery of the conversion of the bonds belonging to the Savings Bank

by Hart and the National Bank, there was still on deposit with the Savings Bank the sum of $14,000.00, with interest, belonging to the city of Merced. This represented the balance of the original $25,000.00 deposit of city moneys remaining in the bank after various sums had been disbursed in payment of warrants drawn upon Hart, as city treasurer, against the fund. Upon discovery of the conversion of its bonds and securities the Savings Bank refused to pay to the city or on its account any part of this $14,000.00, but retained the whole of it. As the situation then stood the Savings bank had lost its bonds and securities of the value of $28,000.00 and against this loss it retained $14.000.00 of the deposit belonging to the city of Merced.

At this point numerous actions at law were commenced. One of these was a suit by the city of Merced against the Savings Bank to recover the balance of its deposit, amounting to $14,000.00, with interest.

Thereupon the Fidelity and Deposit Company of Maryland, surety on Hart's official bond as city treasurer, entered the picture. As a result of certain negotiations between the surety company, the Savings Bank and the city of Merced, the plaintiff and appellant, as successor of the Savings Bank, paid the city the balance of its deposit, amounting to $14,000.00 and interest. The surety on Hart's bond, Fidelity and Deposit Company of Maryland, thereupon paid the plaintiff and appellant, as successor of the Savings Bank, an amount equivalent to the sum paid the city, although it protested it was not liable for the conversion of the bonds by Hart and the National Bank.

The suit commenced by the city against the Savings Bank for this sum of $14,000.00 was thereupon dismissed, as were the various other actions commenced about the same time. In addition to this sum of $14,000.00 the Fidelity and Deposit Company of Maryland, surety on Hart's bond, paid the plaintiff and appellant, as successor of the Savings Bank, the sum of $5,500.00 in cash. As the situation then stood plaintiff and appellant, as successor of the Savings Bank, had lost its bonds and securities of the value of $28,000.00, but had received reimbursement therefor to the extent of $19,500.00, with interest it had paid on the deposit of the city moneys. This reimbursement was made, not by Hart or the National Bank, the joint tort feasors in the conversion of the bonds, but by the Fidelity and Deposit Company of Maryland, the surety on Hart's official bond as treasurer of the city of Merced.

Upon the making of these payments the surety company entered into an agreement with the plaintiff and appellant, as successor of the Savings Bank, that the latter should commence this action for the value of the bonds converted by the National Bank, and that if successful in recovering judgment it would pay one-half of the net proceeds of the suit to the surety, Fidelity and Deposit Company of Maryland. The agreement was effected between the plaintiff and appellant and the surety company through oral negotiations and correspondence. The substance of this agreement is embodied in a letter under date of August 12th, 1927, written by Guy LeRoy Stevick, as vice-president of Fidelity and Deposit Company of Maryland, and addressed to Louis Ferrari, as

vice-president of plaintiff and appellant. The body of the letter [Record p. 97] is as follows:

> "*In re J. B. Hart.*
>
> I beg to confirm the terms of settlement of claims against us under the above bond, to-wit:
>
> 1. We will pay to the City of Merced the sum of $11,000.
>
> 2. We agree to hold the City of Merced harmless from the claim of the Receiver based upon certain warrants aggregating $3,027.62.
>
> 3. *We will pay to you the amount of City's deposit and interest upon it at the rate agreed to be paid by your bank (This amount to be paid by you to the City).*
>
> 4. We will pay to you further the sum of $5,500. and will agree also to pay you one-half of any saving which we may make on the claim of the Receiver against the City. It is to be understood, however, that we reserve the right to pay that claim in full, or to make any adjustment we think best.
>
> 5. We understand you will at once bring suit against the Receiver of the Farmers & Merchants Bank for the value of the bonds misappropriated by that bank, and that in consideration of the payments made to you you will, if successful, pay to us one-half of the net proceeds of that suit after deducting all costs, expenses and attorneys fees. In case either you or we are reimbursed in full for any loss then the other party shall be entitled to the balance of the net proceeds until it is fully reimbursed.
>
> I am sending a copy of this letter to Mr. Henderson, and if he and you advise that this is satisfactory we will make payment forthwith."

The $11,000.00 mentioned in the first paragraph of the letter represents other defalcations of Hart as city treasurer and is not involved in this litigation. The

second paragraph refers to warrants outstanding against the funds of the city of Merced then on deposit with the plaintiff and appellant.

The court ultimately found that the value of the bonds and securities converted by the National Bank was $27,300.00, and that subsequently there was paid to the plaintiff and appellant by the Fidelity and Deposit Company of Maryland, the corporate surety upon the official bond of J. B. Hart, as city treasurer, the sum of $20,547.02, leaving unpaid the sum of $6,752.98. [Record pp. 56 and 57.] Judgment was entered against the appellees for this amount with interest and costs of suit. [Record pp. 58 and 59.]

The only question for determination upon this appeal concerns the soundness of the trial court's ruling that the various amounts paid to the plaintiff and appellant by the Fidelity and Deposit Company of Maryland, as surety on Hart's bond, aggregating $20,547.02, should be deducted from the total value of the bonds at the time of the conversion. The contention of the plaintiff and appellant is that no deduction should be made from the full value of the bonds, $27,300.00, by reason of payments made under the circumstances by the bonding company, and that the judgment for the plaintiff and appellant should be for the full sum of $27,300.00 instead of $6,752.98.

We believe that under the undisputed facts in the case and the law applicable thereto the learned trial judge, in this most important decision in the case, was in error, and that the judgment should be reversed or modified so as to accord with the evidence and the law applicable thereto. We are satisfied that this should be done for a number of reasons which we will set forth and discuss in order.

I

One Who Wrongfully Converts Property Owned by Another Is Liable for the Full Value Thereof, and Cannot Claim Credit for Reimbursements Made to the Owner by a Third Person Who Is Not Acting in Privity With Such Wrong-Doer.

It is an admitted and uncontroverted fact upon this appeal that the bonds and securities involved were the property of the Savings Bank, the predecessor in interest of the plaintiff and appellant, and that said bonds and securities, after being entrusted to Hart as city treasurer, were delivered by him to the appellee, the National Bank, and were afterwards sold and converted by said National Bank to its own use and benefit without the knowledge or consent of the Savings Bank, or the city of Merced. These facts were expressly found to be true by the trial court in its findings, as shown at page 54 of the record. It was further expressly found by the trial court [Record p. 56] that these bonds and securities at the time of the conversion, and at all times thereafter, were of the value of $27,300.00.

From the foregoing it would seem to follow, as surely as day follows night, that the plaintiff and appellant in this case, as the successor in interest of the Savings Bank, is entitled to recover from the defendant and appellee, the National Bank, the full sum of $27,300.00, the value of the bonds and securities. It is true that the plaintiff and appellant has received some reimbursement for the loss of its bonds and securities from the Fidelity and Deposit Company of Maryland, the surety upon Hart's bond as city treasurer. This reimburse-

ment, however, was received as the result of a private arrangement or settlement between the surety company and the appellant. It was an arrangement or understanding with which the defendant and appellee, the National Bank, was not in any way connected, and was not in any way concerned. It is not contended that the National Bank, the wrongdoer, or Hart, its joint tort feasor, ever contributed a single cent towards the reimbursement received by the plaintiff and appellant on account of the conversion of its bonds and securities.

The situation of the National Bank in this case is exactly analogous to the position of one who converts to his own use the property of another when he has no right, title or interest whatsoever in the property so converted. In this case the National Bank was an entire stranger to the title or ownership of the bonds and securities involved. It possessed no shadow of title to the bonds, and has never claimed and does not now claim ownership of any interest in the same. No right of possession of the bonds or securities, moreover, was ever held by the National Bank. At every stage of the proceeding its dealing with these bonds was wrongful and unlawful Its status in the whole transaction was not essentially different from that of a thief dealing with property, the possession of which had been wrongfully obtained from another.

Yet, according to the undisputed findings of the trial court, the National Bank, through its sale and conversion of these bonds and securities, obtained, and now retains, a profit amounting to $27,300.00. The trial court decrees that of this sum it should be required to

pay back only $6,752.98, and should be allowed to keep the remainder. The reason for this, as set forth in the opinion, is because the plaintiff and appellant has already received from other sources unconnected with the National Bank sums of money sufficient to make up the difference, and that it cannot claim double compensation for the injury occasioned by the conversion of its bonds and securities.

We cannot believe that the trial court was sound in the reasoning by which it arrived at the conclusion stated. We are convinced that the decision of the trial judge was the result of a lack of a thorough consideration of the facts involved and a lack of mature deliberation thereon. This resulted, no doubt, in the hasty and erroneous conclusion that the damages to be awarded to plaintiff and appellant should be the whole loss suffered by it, less the compensation it had received from *any* source, whereas, the true measure of its recovery should have been the whole loss suffered by it through the conversion, less any compensation made by the defendant and appellee, the National Bank, or by those acting in privity with it and making the payment of compensation for its benefit, or less any subordinate interest which the National Bank might have had in the converted property. As we have already stated, the National Bank had no title or interest whatsoever in the converted property subordinate to that of plaintiff and appellant, or otherwise. Further, it is not contended that the National Bank ever made any payment to plaintiff and appellant on account of its wrongful conversion of the property. It is not contended, moreover, that any payment was ever made directly by

Hart, the joint tort feasor of the appellee bank, to plaintiff and appellant by reason of the conversion.

The admitted fact is, as shown by the findings [Record p. 56], that no part of the value of the converted bonds and securities has been paid, except the sum of $20,547.02, which was paid by the Fidelity and Deposit Company of Maryland, the corporate surety upon the official bond of said Hart, as city treasurer.

It was one of the contentions of the defendants in the trial court that the payment of the sum of money mentioned by the surety on Hart's official bond as city treasurer constituted a payment by Hart, or by the estate of Hart, and that by reason of such payment by the surety company, and the subsequent agreement between it and the plaintiff and appellant, a complete settlement was had between Hart, or Hart's estate, and the appellant covering all claims arising from the conversion of the bonds and securities. It was further contended and argued by the defendants in the trial court that inasmuch as Hart was a joint tort feasor with the appellee National Bank, a settlement with and release of Hart, or Hart's estate, operated as a settlement with, and release of, Hart's joint tort feasor, the appellee National Bank.

The findings of the trial court, however, failed to sustain this contention of the defendants. The court held that neither the surety company on Hart's bond as city treasurer nor the city was a joint tort feasor with Hart, or the National Bank, in the conversion of the bonds and securities, and in support of its conclusion cited the case of *Gilbert v. Finch*, 173 N. Y. 455. [Record p. 28.] As to the contention of the defendants that the settlement

and agreement with the surety company constituted a settlement and agreement with Hart's estate and operated as a release and discharge of said estate and the National Bank from further liability, the trial court in its opinion [Record p. 27] said:

> "The record fails to substantiate the contention of defendants that plaintiff, as the Savings Bank's successor, has accepted full satisfaction from the administrator of Hart's estate and has released his estate from any further liability on account of the conversion by Hart of the bonds in controversy. On the contrary, it appears that the plaintiff has presented its claim against the estate of Hart for the value of its securities that Hart misappropriated and it further appears that no settlement or payment of any kind has been made or received on said claim. All that was done by plaintiff or its assignor was to dismiss the suit against the administrator of Hart's estate. The record shows no acknowledgment of satisfaction of the claim against Hart or his estate. It is true that where a suitor settles with one of two joint tort feasors and releases such one from further liability, his action is in effect a release of both joint tort feasors, but in my opinion, the proof in this complaint falls short of bringing the facts of this case within the aforesaid rule. The action of the successor of the Savings Bank in dismissing the case against Hart and the corporate surety on his official bond as city treasurer to recover the value of the securities converted amounted to nothing more than a covenant not to sue the Hart esetate or the Surety Company and cannot be said to have been the discharge of a joint tort feasor that would operate to release a National Bank from its liability because of its conversion through the agency of Hart of the bonds of the Savings Bank. The letters consummating the settlement agreed upon by the surety company, city of Merced and plaintiff contain a reservation by plaintiff as the Savings Bank's successor of its right to pursue the National Bank on Hart's default, and no acquit-

> tance is therein given to Hart's estate. The estate of Hart stands in the position of the joint tort feasor with the National Bank and it has never been released."

These findings and conclusions of the trial judge, subsequently carried into the findings of fact, approved by him and filed in the case, are unquestioned on this appeal. Without further argument, therefore, we may assume that the payments made by the surety company and its settlement and agreement with the plaintiff and appellant did not operate as a release of Hart, or Hart's estate, or the National Bank from any liability incurred by them by reason of their conversion of the bonds and securities of the plaintiff and appellant.

Yet the court held that these payments so made by the surety company should be deducted from the sum ultimately found to be due to the plaintiff and appellant by reason of the conversion. The portion of the trial court's decision from which this appeal is prosecuted is shown at page 28 of the record, where the court, among other things, says:

> "There can be but one compensation for an injury or tort of the kind that is involved in this suit, which is the market value of the securities converted at the time of conversion, with interest thereon until judgment. The plaintiff has received partial compensation of its loss. It is immaterial from whom any portion of such damage is paid, but any payment on account thereof reduces the liability *pro tanto.*"

This decision of the trial court is repeated in its supplemental decision in the case by certain language found at page 30 of the record, as follows:

> "Of course, if it is a fact that reimbursement was made and plaintiff actually received any sum of money in addition to the $5,500.00 in the settlement, then under the memorandum of decision, defendants would be entitled to credit for such additional amounts received by plaintiff herein, and the order for findings and judgment in favor of plaintiff and against defendants should be correspondingly modified."

We repeat that in our opinion the learned trial judge was in error in the language quoted. The liability of the defendants and appellees was not measured by what the plaintiff and appellant lost, less what it received in the way of compensation from any source, but was measured by what the plaintiff and appellant lost, less what the defendants had paid on account of the loss. Neither the defendants nor anyone acting for their benefit, paid anything whatsoever on account of the loss suffered by the plaintiff and appellant, and the measure of its recovery should be, therefore, the full value of the bonds and securities converted.

If the decision of the trial court upon this particular point is sound, and the right of plaintiff and appellant to recover is limited to the difference between what it has lost and what it has received as compensation from any source, then it permits the defendants and appellees to violate the maxim, "No man shall profit by his own wrong." Obviously, thtrough their own wrong, the defendants received the benefit of $27,300.00, the value of the property converted. By the decision they are required to pay only $6,752.98. In other words, they are allowed a clear profit on the reprehensible transaction to the extent of $20,547.02.

As we have already stated, there is no question that the absolute title and unqualified right of possession of the bonds and securities were in the plaintiff and its predecessor at the time of the commencement of the action. The bonds and securities had originally been deposited with Hart, as treasurer of the city, as security for a deposit of $25,000.00 of city funds placed in the bank. This deposit had been repaid in its entirety to the city. The plaintiff and appellant, as successor in interest of the Savings Bank, thereupon immediately became entitled to the possession of its bonds. The defendants were strangers to the title. They did not even possess a special or limited interest in the bonds and securities which would entitle them to any offset as against the full value recoverable by the plaintiff, or which would in any way limit recovery by the plaintiff.

The fact that the surety company on Hart's official bond and the plaintiff had entered into an agreement, whereby the surety company shared part of plaintiff's loss, and whereby it was agreed that the surety company should in turn share in the recovery by plaintiff in this action, could not be a matter of any concern to the defendants.

Where the defendant has no ownership in the property converted, the sort of title or interest enjoyed by the plaintiff is immaterial, and the full value of the property may be recovered.

Corey v. Struve, 170 Cal. 170;

California C. Fruit Assn. v. Ainesworth, 134 Cal. 461;

Thompson v. Toland, 48 Cal. 99.

In the *Corey v. Struve* case defendant had leased from plaintiff a tract of land for the purpose of growing beets. It was stipulated that the beet tops should not be removed from the land but should be allowed to remain thereon as fertilizer. The defendant sold the beet tops for cattle feed. In the suit, which was for the value of the beet tops, the defendant contended that the beet tops had been fed to cattle grazing on the premises and thereby fertilized the same better than would the beet tops. The court held that while this contention might be true, it did not constitute a credit or offset in favor of the defendant, and that the plaintiff was entitled to recover the full value of the beet tops. The court said:

> "The sort of ownership enjoyed by the plaintiff is a false quantity because the defendants were not and did not claim to be owners of any part of the beet-tops. So far as they were concerned the plaintiff had full title to the property, and the fact that he was bound by his contract to allow them to apply his property to the enrichment of land from which they were to get a portion of the crops, did not make them part owners of the beet-tops. The rule that the owners of a special interest in property may recover only to the extent of such interest applies only to cases where the suit is brought against the owner of the remaining interest or his assignee. (*California C. F. Assoc. v. Ainsworth,* 134 Cal. 463 (66 Pac. 586).) The tops had a value as fertilizer when plowed under and a value as cattle food. If the owner chose to enter into a contract whereby his tenants were to plow the tops under, surely the tenants' violation of that agreement could not clothe them with proprietorship of the feed. Suppose instead of beet-tops the property had been horses and plows which under the lease the tenants were bound to use only upon the landlord's acres, delivering the implements and animals to the owner at the end of the season in good condition, and suppose

> that after doing the plowing on their landlord's fields the tenants had rented the personal property to a neighbor on the theory that the exercise was good for the horses and the extra plowing efficacious for keeping the rust from the plows, would any one contend that the tenants might retain the fruits of the unauthorized exploitation of their landlord's property? So in the case before us, the unauthorized profit should belong to the person whose property earned it."

The true rule, of course, in cases of this kind is that where the plaintiff has only a special interest or limited property in the thing converted he may recover from the owner of the remaining interest, or from one claiming under such owner, only to the extent of his special or limited interest. This is true, for instance, in the case of an action by a pledgor against the pledgee for conversion. From any recovery had by a plaintiff in such an action against a defendant in such an action, the amount due the pledgee must be deducted from the value of the property converted. But in cases where the defendant has no interest or ownership whatsoever in the property converted, then the plaintiff, no matter what his own interest therein may be, is entitled to recover the full value.

If an action of trover be instituted by one who is entitled to bring the action, though he has but a limited interest in the property alleged to have been converted, he is entitled to recover the full value of the property as against a stranger.

Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770;
Jones v. Kellogg (Kan.), 33 Pac. 997;
Harker v. Dement, 9 Gill. (Md.) 7, 52 Am. Dec. 670;

Adams v. O'Connor, 100 Mass. 515, 1 Am. Rep. 137;

Booth v. Ableman, 20 Wis. 21, 88 Am. Dec. 730, 26 R. C. L. p. 1152.

In such a case any question as to a settlement between the plaintiff and a third person who also owns, or has acquired some interest in the property, is a question with which the court is not in any manner concerned. It was so held in the case of *Angier v. Taunton Paper Mfg. Co.* (Mass.), 61 Am. Dec. 436. Here the purchaser of a machine had agreed that the title should remain in the plaintiff until fully paid for, and such purchaser wrongfully mortgaged it to the defendant, who converted it to his own use after the purchaser had paid one-half of the purchase price. It was held that no deduction by reason of such payment should be made in the action against the defendant. In other words, it was held that the plaintiff could recover the full value of the machine, notwithstanding it had already received one-half the purchase price thereof from a third party.

The rule in such cases is fully set forth in 26 *Ruling Case Law,* under the title "Trover," section 68, at page 1152. The cases which we have already cited are discussed and, generally, it is said:

> "If an action of trover be instituted by one who is entitled to bring the action, though he has but a limited interest in the property alleged to have been converted, he is entitled to recover the full value of the property as against a stranger. The question as to any settlement between the plaintiff and the third person who also owns an interest in the property is not before the court. Thus, where the purchaser of a machine had agreed that the title should remain in the

plaintiff until fully paid for, and such purchaser wrongfully mortgaged it to the defendant who converted it to his own use after the purchaser had paid one-half of the purchase price, it was held that no deduction by reason of such payment should be made in the action against the defendant. However, if the property is converted by the owner of an interest therein or by one acting in privity with him, the plaintiff can recover only to the extent of the value of his own interest in the property. Thus, in an action of trover by a general owner against a lienholder, or one who claims under such lienholder, the amount of the lien of the latter must be deducted from the value of the property. So also it has been held that a constable can recover only the amount of his execution in an action of trover against an assignee of the debtor who has taken the goods after the levy."

We trust that we have cited enough authorities on this particular point to show that, under the admitted facts in this case, the trial court was in error when it held that because the plaintiff and appellant had been reimbursed for a portion of its loss by the surety company it was precluded from recovery of its full loss from the defendants.

II.

The Payment of Part of the Loss by the Surety Company and Its Release From Liability by the Plaintiff Did Not Operate as a Release of Hart, or the National Bank as Joint Tort Feasors.

In view of the plainly worded decision of the trial court it is hardly necessary to discuss this proposition. The court correctly held that while the estate of Hart stands in the position of a joint tort feasor with the National Bank, neither the surety company nor the city were joint tort feasors with Hart or the National Bank. It further

held that neither the estate of Hart nor the National Bank had ever been released. There is no appeal from the decision of the court on these points and they stand before this court as adjudicated facts, binding upon both of the parties.

It is true that the surety company, by reason of its bond, was jointly liable with Hart to the city to the extent of its undertaking. But its liability was essentially different from that of Hart. The liability of the latter for the conversion was primary and was for damages arising from a tort. The liability of the surety company, on the other hand, was secondary to that of Hart and was based upon its contract of suretyship. Obviously, therefore, it was not a joint tort feasor with Hart.

Nor did the settlement between the plaintiff and appellant and the surety company, and the release of the surety company from further liability, in any way affect the liability of Hart, or of Hart's estate, or of the National Bank. A creditor may, if he so elects, release or compound with a surety without in any way affecting his right to hold the principal for his full liability.

Nashua Sav. Bank v. Abbott (Mass.), 63 N. E. 1058;

Farmers etc. Bank v. Rathbone (Vt.), 58 Am. Dec. 200.

In this connection it will be noted that at the time of the settlement between the plaintiff and appellant and the surety company various actions at law were pending in which the surety company was an interested party: (1) The Savings Bank had commenced a suit against Hart

and the surety on his official bond as city treasurer to recover the value of the bonds and securities converted by Hart; (2) the Savings Bank had commenced a suit against the city of Merced to recover the value of the securities converted by Hart; (3) the city of Merced had commenced a suit against the Savings Bank to recover the balance of the special deposit of city moneys that remained on deposit in the plaintiff bank as successor of the Savings Bank; and (4) the city of Merced had sued Hart and the surety company to recover city moneys of approximately $30,000.00 misappropriated by Hart. As a result of the settlement between the plaintiff and appellant and the surety company all these suits were dismissed. The surety company disclaimed liability to the Savings Bank or to plaintiff and appellant, as its successor, because of the conversion by Hart of the bonds and securities. It was, however, clearly liable to the city for the balance of the deposit in the Savings Bank which the plaintiff and appellant retained and refused to pay over. The ultimate settlement, therefore, between the plaintiff and appellant and the surety company covered a multitude of transactions. In its payments to the plaintiff and appellant, what it really did was to purchase immunity from further liability on account of any of the suits then pending, including the suit where the city, as plaintiff, sued it and Hart for the balance of the deposit in the Savings Bank.

Such settlement and release of the surety company by the plaintiff and appellant, therefore, had no effect whatsoever in discharging Hart from liability because of his conversion of the bonds and securities belonging to the plaintiff and appellant. Neither Hart nor the National

Bank is entitled to credit for any sum paid by the surety company in consideration of its release.

Gilstrap v. Smith, 28 S. E. 608, 21 R. C. L. p. 1050.

While unquestionably the law is that if the creditor, without the knowledge and consent of the surety, should release the principal debtor, the surety would be thereby released, the release of a surety does not increase the legal or equitable responsibilities of the principal, nor as to him change the nature or extent of his obligation.

In 21 *Ruling Case Law,* page 1049, section 94, it is said:

> "Not only may a creditor, if he so chooses, release or compound with a surety, but he may do so without in any way affecting his right to hold the principal to his ultimate liability. In other words, not only will such a release have no effect in discharging the principal, but the latter will not be entitled to credit on his obligation for any sum paid by the surety in consideration of his release as such surety. While unquestionably the law is that if the creditor, without the knowledge and consent of the surety, should release the principal debtor, the surety would be thereby released, the release of a surety does not increase the legal or equitable responsibilities of the principal, nor as to him change the nature or extent of his contract. Nor does the merger of the contract in a judgment exclude the operation of this rule. So where the creditor has levied on property of the sureties, he may, with the consent of the sureties only, although the principal is joined with the sureties as defendants, abandon the levy and sue out a new execution against all the defendants, no injury being done to the principal by releasing the lien on the property of the sureties, since that lien cannot inure to his benefit in any possible event. Since a creditor may relinquish his claim against a surety *a fortiori* he may make a valid

agreement with him for further time without prejudice to the rights of the principal or his creditors."

In 32 *Cyc.* at page 156 it is stated that the release of a surety does not affect the liability of the principal. In support of this proposition numerous cases are cited, and among them the following:

Union Nat. Bank v. Legendre, 35 La. Ann. 787;
Mortland v. Himes, 8 Pa. St. 265;
Wolf v. Fink, 1 Pa. St. 435, 44 Am. Dec. 141;
Baldwin v. Ralston, 6 Pa. Dist. 198;
Ragsdale v. Gossett, 2 Lea (Tenn.) 729;
McIlhenny Co. v. Blum, 68 Tex. 197, 4 S. W. 367;
Bridges v. Phillips, 17 Tex. 128.

It is important to keep in mind the theory under which the various payments were made by the surety company and the true nature of the settlement between it and the plaintiff and appellant. In order to secure a compromise and settlement of all the suits in which it was interested as a party defendant, it first paid to the plaintiff and appellant the sum of $14,000.00, with interest. This represented the balance of the city deposit originally made with the Savings Bank. The plaintiff and appellant, upon receipt of this $14,000.00 and interest, released the balance of the deposit to the city. This payment was, therefore, in effect a payment by the surety company to the city of the balance of its deposit with the Savings Bank. Prior to this the Savings Bank and the plaintiff and appellant had refused to turn this balance over to the city because of the conversion of its bonds and securities by Hart, the city treasurer. The surety company was clearly liable to the city for this sum of money, although it disclaimed any

liability to the Savings Bank or to the plaintiff and appellant by reason of the conversion by Hart of the bonds and securities. The surety company next paid to plaintiff and appellant the sum of $5,500.00. This was paid as part of its settlement with the plaintiff and appellant whereby it secured a release and immunity from further liability on account of any of the litigation which had then been commenced. Neither of these payments was made by the surety company or received by the plaintiff and appellant with the intent to discharge or diminish the liability of Hart.

When these payments were made there was forthwith vested in the surety company a cause of action against Hart, under the provisions of section 2847 of the California Civil Code, which reads as follows:

> "If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses."

By reason, therefore, of the settlement and the payments made by the surety company, the latter became interested in any judgment the plaintiff and appellant might obtain against the appellee National Bank as the joint tort feasor of Hart. Accordingly, it was made a part of the agreement of settlement that the plaintiff and appellant should commence this action and that any sums recovered should be shared by the plaintiff and appellant and the surety company in the proportions set forth in the agreement. In the action which was later commenced the plaintiff and appellant might have made the estate of Hart a party defendant with the National Bank. The estate, however,

was in the process of probate and the plaintiff and appellant had, in the probate proceedings, duly presented its claim for the full amount involved in this action. The joining of the Hart estate as a party defendant, therefore, would have been attended with some difficulty and would have been entirely unnecessary. The appellee National Bank cannot be heard to complain because of the non-joinder of the Hart estate as a party defendant. Neither can it be heard to say that such failure constitutes an admission that the estate of Hart has been settled with and released from liability, either in whole or in part. The liability of the estate remains the same as it was before the settlement and before the commencement of this action.

Under the facts in this case and the decision of the trial court, and the authorities referred to, it is inconceivable to us that the appellee National Bank can contend on this appeal that the payments made by the surety company to the plaintiff and appellant, and its consequent discharge from further liability, operated as a discharge of Hart, or Hart's estate, or the National Bank, appellee in this case.

III.

The Bank of Italy Is the Proper and Only Necessary Party Plaintiff to the Present Action.

We have already sufficiently discussed the uncontroverted fact that, at the time of the conversion of the bonds and securities by Hart and the appellee National Bank, the plaintiff and its predecessor in interest were the legal owners of such bonds and securities and that at the time of the commencement of this action the plaintiff was entitled to the possession thereof. It is fundamental that the owner of the legal title to the property converted is the

proper party plaintiff in an action founded upon the conversion. This is especially true where such owner is also vested with the right of possession of the property at the time of the conversion.

Rosenthal v. McMann, 93 Cal. 505;
Mier v. So. Cal. Ice Co., 56 Cal. App. 512;
Moody v. Goodwin, 53 Cal. App. 693.

As has been stated, there can be no doubt that the plaintiff was the legal owner and entitled to the possession of the bonds and securities at the time of the commencement of this action. It does not matter that it had been reimbursed by a third party, the surety company, for a portion of the loss which it had sustained through the conversion of the bonds and securities. If these reimbursements had been made by the appellee National Bank, or by its joint tort feasor, Hart, or Hart's estate, they, or any of them, would have been entitled to proportionate set-offs or credits against the value of the property converted. None of these reimbursements having been made, however, by any of the joint tort feasors, none of the latter, including the National Bank, is entitled to any credit or set-off and the plaintiff is entitled to full recovery for the wrongful act.

The mere fact that the surety company entered into an arrangement with the plaintiff whereby it paid plaintiff part of the latter's loss, and in consideration of such payment became entitled to share in the ultimate recovery by plaintiff against the wrongdoers, is a matter of no concern to such wrongdoers. So far as they and their rights are concerned, the collateral agreement between the plaintiff and appellant and the surety company is entirely immaterial. Their liability was measured by the loss occasioned

through their wrongful act. The only way in which they could extinguish or diminish such liability was through payment, in whole or in part, of the obligation incurred. Payment to the plaintiff by them, or by one acting for their benefit, would have accomplished the desired result. The mere fact that a third person paid to plaintiff a part of the loss and became interested and entitled to share in the ultimate recovery against the wrongdoers would not in the least affect the liability of the latter, or the obligation imposed upon them by law.

It has already been noted that the settlement and arrangement between the plaintiff and appellant and the surety, Fidelity and Deposit Company of Maryland, was finally set forth in a confirmatory letter written by the surety company and addressed to and acted upon by the plaintiff and appellant. This letter is shown at page 97 of the record. The portion thereof which concerns us at this point of the discussion is worded as follows:

> "We understand you will at once bring suit against the receiver of the Farmers & Merchants Bank for the value of the bonds misappropriated by that bank, and that in consideration of the payments made to you, you will, if successful, pay to us one-half of the net proceeds of that suit, after deducting all costs, expenses and attorney's fees. In case either you or we are reimbursed in full for any loss, then the other party shall be entitled to the balance of the net proceeds until it is fully reimbursed."

By reason of the arrangement evidenced by this letter it is obvious that the plaintiff and appellant bank was thereby made the trustee and agent of the Fidelity and Deposit Company of Maryland. In bringing this action, pursuant to the directions contained in the letter, it was

acting not only in its own right for the recovery of that portion of its loss for which it had not received reimbursement, but also as the express trustee of the Fidelity and Deposit Company of Maryland for the recovery of that portion of its loss for which it had received compensation or reimbursement from the surety company. As against the defendants, however, there was but a single cause of action which was based upon the single wrongful act of conversion of the bonds and securities.

Fairbanks v. S. F. & N. P. Ry. Co., 115 Cal. 583.

The Bank of Italy, the plaintiff and appellant, and the Fidelity and Deposit Company of Maryland could not have joined as plaintiffs in the action because the amounts to which each would be entitled would be different and there could be no joint judgment.

Atchison, Topeka & S. F. Ry. Co. v. Neet, 54 Pac. 134.

It was entirely proper that the plaintiff and appellant should become the sole plaintiff in the action and bring the suit in its own name without reference to its beneficiary, the Fidelity and Deposit Company of Maryland. Section 369 of the *California Code of Civil Procedure,* in part, reads as follows:

> "An executor or administrator, or trustee, of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted."

Where the legal title to property is vested in a trustee, it is unnecessary to state in his complaint the means by which he acquired it.

Dambmann v. White, 48 Cal. 439;
Giselman v. Starr, 106 Cal. 651;
Bliss on Code Pleading, Sec. 262;
Pomeroy on Code Remedies, Sec. 132;
Munch v. Williamson, 24 Cal. 167;
Lewis v. Adams, 70 Cal. 403.

In the case of *Cortelyou v. Jones,* 132 Cal. 132, the rule in California on this point is clearly stated. The court says:

> "The appellants urge in support of their appeal that, as under the assignment the plaintiffs are made the trustees of an express trust, they could bring the action only in their representative capacity, and should have set up in their complaint the facts creating the trust, and were not entitled to a judgment in favor of themselves individually. Their contention in this respect cannot, however, be sustained. By the terms of the assignment the mortgages and debts were transferred to the plaintiffs, 'to be collected, and the proceeds to be held in trust.' The legal title thereto was therefore vested in the plaintiffs, and the beneficiaries under the trust had no interest, except in the proceeds of the collection. A payment by the defendants to the plaintiffs without suit would have exonerated them from all liability to the beneficiaries, and they will be equally exonerated by a satisfaction of the judgment herein."

In the case of *McElmurray v. Harris,* 43 S. E. 987, it was held that where the party in whom the title was at the time of the conversion sues in trover for the use of another, the name of the usee may be treated as surplusage.

In the case of *Chamberlain v. Woolsey,* 95 N. W. 38, it was held that one having the legal title and right of pos-

session of personal property at the time of the conversion may sue for such wrongful conversion without joining a party who may have a beneficial interest therein.

The rule that every action must be prosecuted in the name of the real party in interest has been fully complied with in this case. The object of this rule is to save the defendant from further harassment or vexation at the hands of other claimants to the same demand. The primary and fundamental test to be applied, therefore, in any case is whether the suit will accomplish this result.

Los Robles Water Co. v. Stoneman, 146 Cal. 203;
Woodsum v. Cole, 69 Cal. 142.

The plaintiff in this case has shown that it possesses such title and right of possession to the property converted that a judgment upon it, satisfied by the defendants, will protect them from future loss. In any future action based upon their wrongful act in converting the bonds and securities, they will be able to plead the judgment in this case as a defense. The defendants are not further concerned with who may or may not be the plaintiff in this action. As to them, the action is being prosecuted in the name of the real party in interest.

Los Robles Water Company v. Stoneman, supra;
Iowa & California Land Co. v. Hoag, 132 Cal. 627;
Kelley-Clarke Co. v. Leslie, 61 Cal. App. 559.

So far as the defendants in this case are concerned it is not for them to question the extent of the interest of plaintiff in the subject matter of the litigation. Anyone having such interest in the property converted as will enable him

to maintain an action for the tort is the real party in interest and may sue in his own name.

Hansen v. Townsend, 73 Cal. 415;
Walker v. McCusker, 71 Cal. 594;
Lauer v. Williams, 32 Cal. App. 590.

Still another good and sufficient reason why the defendants in this case cannot complain that the action was not brought in the name of the real party in interest lies in the fact that they did not, either by demurrer or answer, question the right of the plaintiff to sue. They had full knowledge of the true facts and of the payments made by the surety company. This is evidenced by the fact that these matters are set forth in their answer. Under the circumstances, therefore, they must be deemed to have waived any objection to the bringing of the action in the name of the plaintiff alone, or any objection to the non-joinder of the surety company, or to the failure to set up the rights of the surety company as a beneficiary.

Kline v. Guaranty Oil Co., 167 Cal. 476;
Graham v. Light, 4 Cal. App. 400;
Coch v. Story, 107 Pac. 1093.

In the case of *Kline v. Guaranty Oil Co., supra,* the Supreme Court held:

> "In this action by a lessee of oil property to recover his damages for a breach of the lease, consisting of the expense incurred in the examination of title, the drawing of papers necessary to the performance of the contract, and the preparation to enter upon the premises, the lessee is held to be the proper party plaintiff, although he had assigned the lease, but the defendant, with knowledge of the assignment, failed to raise the question, by demurrer or otherwise, of

> the right of the lessee to sue, and allowed the case to be tried on the theory that the plaintiff was entitled to sue if anyone was."

We have, in the preparation of this opening brief, dwelt upon many points, somewhat in anticipation of points which will be urged by the appellees. This is based upon certain contentions made by the appellees in the trial court and to some extent shown by the pleadings. In their answer, for instance, at page 17 of the record, the defendants allege:

> "* * * that prior to the commencement of the above entitled action the said Merced Security Savings Bank and the plaintiff herein settled and adjusted any and all claims arising out of the transaction concerning said bonds mentioned in the complaint herein with the sureties of the said J. B. Hart as city treasurer of the city of Merced, and defendants are informed and believe, and upon such information and belief allege the fact to be, that a surety company, the name of which is unknown to the defendants herein, fully paid and discharged all of the obligations of the said J. B. Hart as city treasurer of the city of Merced and of said surety company as his surety as such public officer to the said Merced Security Savings Bank and to the plaintiff herein, and that the said Merced Security and Savings Bank and the said plaintiff herein then, at the time of said settlement and prior to the commencement of this action, received from the said surety company, whose name is unknown to these defendants, full pay and compensation for any and all losses sustained by them, or by either of them, by reason of any and all transactions of the said J. B. Hart as treasurer of the said city of Merced, or in any manner whatsoever in connection with any and all of the bonds mentioned in the complaint herein and received by the said J. B. Hart as treasurer of the city of Merced as security for deposits made of moneys belonging to the said city of Merced in the said Merced Security Savings Bank."

Under these allegations the defendants at the trial sought to show that prior to the commencement of this action the plaintiff and appellant, by the settlement and agreement with the surety company, settled with Hart on account of his conversion of the bonds and securities, and thereby fully released Hart and extinguished the obligation on his part to pay the loss occasioned by his wrongdoing. We think we have sufficiently shown, however, that the agreement between the plaintiff and appellant and the surety company did not have the effect of releasing Hart, or the estate of Hart, or of extinguishing the obligation incurred by Hart in the wrongful conversion of the bonds and securities. Inasmuch as Hart and his estate were not so released, his joint tort feasor, the appellee National Bank, was likewise not released.

As we have already said, moreover, we believe that this question was fully settled and adjudicated by the decision of the trial court from which the defendants and appellees have not appealed. The court expressly found that neither Hart nor his estate was released from liability by the agreement with plaintiff and appellant releasing the surety company. We submit that the defendants and appellees are bound by such finding of the trial court on this appeal.

In conclusion we submit that from all that has been said it must appear to this court:

1. That the plaintiff and appellant was the real party in interest, and that the action was properly brought in its name alone.

2. That the payments made to plaintiff and appellant by the surety company which preceded this litigation cannot be credited to the defendants for the reason that these

payments were part of a collateral agreement in which the defendants were not in any manner concerned.

3. That although these payments were made by the surety company on Hart's official bond, they did not operate as a release, either in whole or in part, of the obligations imposed upon Hart by operation of law resulting from his wrongful conversion of the bonds and securities.

4. That inasmuch as neither Hart nor his estate was released from liability, his joint tort feasor, the appellee National Bank, was not released.

5. That plaintiff and appellant was entitled to recover the full value of the bonds and securities converted, amounting to $27,300.00, and was not restricted, as found by the court, to recovery in the sum of $6,752.98 only.

We submit that in view of what has been said, and in view of the authorities cited, the judgment appealed from should be modified in accordance with the views which we have expressed.

Respectfully submitted,

F. W. Henderson,
Louis Ferrari and
J. J. Posner,
Attorneys for Plaintiff and Appellant.

APPENDIX.

Memorandum of Decision on Merits.

This is an action for conversion of personal property by plaintiff as assignee of Merced Security Savings Bank (herein called Savings Bank) against Farmers and Merchants National Bank of Merced (herein called National Bank), and Henry P. Hilliard as receiver thereof. The suit was originally filed in the State Court of California, but was removed here by the National Bank's receiver.

The Savings Bank in order to obtain a deposit of $25,000.00 of the funds of the city of Merced, a municipal corporation of California, from one J. B. Hart, the city treasurer, deposited with Hart, as city treasurer, certain of its negotiable municipal bonds of the value of approximately $28,000.00. These securities were required by the laws of California to be deposited in order that the Savings Bank could receive the deposit of the city's funds. (California Statutes, 1923, pages 25-28.) Upon delivery of the bonds to him, Hart, as treasurer, deposited $25,000.00 of the city's money in the Savings Bank. At the time of the deposit of the bonds of the Savings Bank, Hart was also president and active manager of the National Bank and transacted the business of the two offices in the same premises, using the premises and facilities of the National Bank as a depositary of city monies and securities. The complaint alleges that between Dec. 31, 1925, the date of the deposit and placing of the securities of the Savings Bank with Hart, as city treasurer, and September 20, 1926, Hart delivered the possession of said bonds to the National Bank, and that on May 13, 1926, the Na-

tional Bank sold and converted said bonds of the Savings Bank or of the city of Merced and appropriated the proceeds thereof to its own use to the damage of the Savings Bank in the sum of $28,000.00. Judgment is asked against defendants for that amount of money and interest from date of conversion. It is alleged that the sale and conversion of said bonds was not made in connection with said deposit of public funds and was not dependent upon or connected therewith in any way whatever. This latter allegation is uncontroverted and stands in the record as admitted. The complaint further avers that the conversion was unknown to the Savings Bank or to its successor, plaintiff herein, and was not discovered until subsequent to November 20, 1926, at which time the National Bank went into liquidation and the defendant receiver was named by the comptroller. The customary allegations of demand and refusal to deliver together with the usual averment of presentation of claim to the receiver and rejection thereof by him appear in the complaint as do also the ordinary allegations of assignment of the claim sued on to plaintiff herein. The misappropriation of the bonds placed with Hart to obtain the deposit of city money in the Savings Bank was an incident in a series of defalcations of Hart as city treasurer of Merced that culminated in his suicide shortly after discovery of his iregularities.

The answer of defendants denies the allegations of conversion by the National Bank and generally denies all of the other essential allegations of the complaint including a denial that defendant National Bank at any time received, acquired title to, or converted any of said deposited bonds of the Savings Bank. It is claimed that Hart as

agent of the National Bank never received or converted the bonds, but that his wrongdoing was personal or as city treasurer and not imputable to the National Bank. The answer sets up a further defense that there has been a compromise, settlement, and discharge of the claim of plaintiff and its assignor by reason of the alleged conversion of the bonds of the Savings Bank and that the claim of plaintiff and its assignor has been fully satisfied and paid by reason of certain transactions between the surety on the official bond of Hart as city treasurer, the city of Merced, a municipal corporation, and the plaintiff.

It is unnecessary to review in detail the evidence. It is complicated and involved. It is sufficient to state that it establishes the right of the plaintiff to recover under the issues raised by the complaint and answer.

The correspondence of Hart as the National Bank president as well as the books and records of the National Bank and specifically the entries therein concerning the bonds alleged to have been converted, clearly show that Hart was the agent of defendant National Bank in dealing with the securities in suit and that the conversion of the bonds of the Savings Bank admittedly made by Hart is chargeable to the National Bank as his principal. These records represent that the National Bank was the owner of the securities. The city could not be held chargeable for Hart's keeping, management and disposal of the bonds under the applicable California statutes (Sec. 8, Cal. Stat. 1923, p. 25.) It is contended that the National Bank should not be held accountable for the conversion and loss of the securities of the Savings Bank

because the evidence fails to show that the National Bank profited by the irregularities and dishonesty of Hart in converting these securities. I cannot agree with this contention. The record is clear that the assets of the National Bank were preserved and enhanced by its president's transactions concerning these bonds with the First National Bank in Fresno. The transactions were apparently regular and within the apparent lawful and customary duties of an officer of a National Bank and inured to the benefit of the National Bank. See Campbell v. Mfg. Nat. Bank, 91 Am. State Rep.. 438; First Nat. Bank v. Town of Millford, 36 Conn. 93; Bennett v. Judson, 21 N. Y. 238; U. S. v. Pan Am. Pet. Co., 24 Fed. 2nd 209. It is also clear that the Savings Bank sustained detriment and money damage because of the conversion. It has lost its bonds. Its damage is the market value of them. Under such circumstances the responsibility of the National Bank and the right of recovery in the Savings Bank is clear.

The defendant has cited many cases, of which School Dist. of City of Sedalia, Mo., v. De Weese, 100 Fed. 705, is typical. I do not regard these authorities as in point here. In all of them it appeared and was so held that the agent of the bank was acting in his individual capacity or at least was not acting within the apparent scope of his authority as the bank's agent. In the case at bar, however, I have already adverted to the clarity of the evidence that showed the transactions of Hart with the bonds in question to have been those of the National Bank. These facts clearly distinguish the case cited by defendant.

This brings us to a consideration of the final contention of defendants that there has been a compromise and settlement of all claims involving the irregularities and defalcations of Hart as city treasurer and any claim of this plaintiff arising out of the bond transactions that are the subject matter of this action. In support of such contention, it was shown that after discovery of the loss of the securities involved in this suit and of the defalcations of Hart as city treasurer, four actions were commenced, viz.: (1) The Savings Bank commenced a suit against Hart and the surety on his official bond as city treasurer to recover the value of these securities converted by Hart. (2) The Savings Bank commenced a suit against the city of Merced to recover the value of the securities converted by Hart. (3) The city of Merced commenced a suit against the Savings Bank to recover the balance of the special deposit of city monies that remained on deposit in plaintiff bank as successor of the Savings Bank, and, (4) the City of Merced sued Hart and the corporate surety on his official bond to recover city monies of approximately $30,000.00 that Hart misappropriated as city treasurer, and which included the balance of the special deposit of city money with the Savings Bank amounting to $14,000.00 which plaintiff bank, as successor of the Savings Bank, refused to pay over to the city because of the conversion of the bonds by Hart. It further appeared that by negotiations, all of these four suits were dismissed and a settlement reached between litigants. In the settlement, the city received the balance of the special deposit amounting to $14,000.00 from the plaintiff herein, as successor of the Savings Bank

wherein the original deposit of $25,000.00 was made by Treasurer Hart of the city's monies. In addition, the city of Merced received from the surety company $11,000.00 in reimbursement for the defalcations of Hart of the city's money and in addition obtained an agreement from the surety company that it would hold the city harmless from any claim of the defendant receiver because of said outstanding city warrants amounting to approximately $3,000.00. In disposing of the suit by the Savings Bank against Hart and the corporate surety on his official bond, it appeared that the surety company asserted the position that it was not liable to the Savings Bank, but an agreement was entered into between the surety company and the plaintiff bank, as successor of the Savings Bank, which is evidenced by letters that were received in evidence. From these it appears that the surety company paid the various amounts hereinbefore stated and paid to plaintiff, as successor of the Savings Bank, the further sum of $5,500.00, and as part of said adjustment and settlement it was further agreed that plaintiff, as successor of the Savings Bank, would commence this action for the value of the bonds converted by the bank, and if it is successful in recovering against the National Bank and its receiver, it would pay one-half of the net proceeds of the suit to the bonding company. There were other provisions in the settlement, which are immaterial in the consideration of the asserted defense of compromise and settlement. The record fails to substantiate the contention of defendants that plaintiff, as the Savings Bank's successor, has accepted full satisfaction from the administrator of Hart's estate and has released his estate from any further liability on account

of the conversion by Hart of the bonds in controversy. On the contrary, it appears that the plaintiff has presented its claim against the estate of Hart for the value of its securities that Hart misappropriated and it further appears that no settlement or payment of any kind has been made or received on said claim. All that was done by plaintiff or its assignor was to dismiss the suit against the administrator of Hart's estate. The record shows no acknowledgment of satisfaction of the claim against Hart or his estate. It is true that where a suitor settles with one of two joint tort feasors and releases such one from further liability, his action is in effect a release of both joint tort feasors, but in my opinion, the proof in this complaint falls short of bringing the facts of this case within the aforesaid rule. The action of the successor of the Savings Bank in dismissing the case against Hart and the corporate surety on his official bond as city treasurer to recover the value of the securities converted amounted to nothing more than a covenant not to sue the Hart estate or the surety company and cannot be said to have been the discharge of a joint tort feasor that would operate to release a national bank from its liability because of its conversion through the agency of Hart of the bonds of the Savings Bank. The letters consummating the settlement agreed upon by the surety company, city of Merced and plaintiff contain a reservation by plaintiff as the Saving Bank's successor of its right to pursue the National Bank on Hart's default, and no acquittance is therein given to Hart's estate. The estate of Hart stands in the position of the joint tort feasor with the National Bank and it has never been re-

leased. Neither the surety company nor the city were joint tort feasors with Hart or the National Bank. See Gilbert v. Finch, 173 N. Y. 455.

However, it does appear that plaintiff has received $5500.00 in the aforesaid settlement which must be applied in law to the demand sued on in this action. There can be but one compensation for an injury or tort of the kind that is involved in this suit, which is the market value of the securities converted at the time of conversion, with interest thereon until judgment. The plaintiff has received partial compensation of its loss. It is immaterial from whom any portion of such damage is paid, but any payment on account thereof reduces the liability *pro tanto*. Under the aforesaid rule and the evidence in this case, the defendants are undoubtedly entitled to a credit of $5,500.00 on the claim here sued on.

It follows from the foregoing that plaintiff is entitled to findings and judgment under all issues of the complaint and answer herein for the sum of $22,500.00, with interest thereon at the rate of 7% per annum from May 14, 1926, and for its costs of suit herein, all as prayed for in the complaint on file in this cause.

The motion of defendant for special or any findings or judgment contrary to the views expressed in the aforesaid memorandum opinion are and each of them is denied. Counsel for plaintiff will prepare, serve and present under the rules of this court findings and judgment in accordance with the views hereinbefore expressed.

Dated May 1, 1929.

PAUL J. MCCORMICK,
United States District Judge.

Addenda to Memorandum of Decision on Merits.

In the minute order for judgment in favor of plaintiff herein, as well as in the memorandum of decision on merits filed herein, the court has allowed a reduction and diminution of the liability of defendants under the issues of this case for the sum of $5,500.00, while the briefs of both counsel in this case refer to a payment of $20,000.00 to the plaintiff herein by the corporate surety on the official bond of City Treasurer Hart, I have been unable to find any evidence in the transcript of testimony and proceedings on trial of this case showing that the plaintiff herein actually received from the surety company the balance of the city's deposit of $25,000.00 that remained in the Savings Bank at the time of the dismissal of the various suits concerning these transactions. The record is clear as shown by the testimony of Mr. F. W. Henderson, page 112, *et seq.,* of the transcript, and as disclosed by Defendants' Exhibits E and G, that it was part of the settlement that the plaintiff bank upon paying the balance of the city's special deposit to the city would be reimbursed by the surety company. I have not been able to find any further evidence showing that such reimbursement was actually made. Of course, if it is a fact that reimbursement was made and plaintiff actually received any sum of money in addition to the $5,500.00 in the settlement, then under the memorandum decision, defendants would be entitled to credit for such additional amounts received by plaintiff herein, and the order for findings and judgment in favor of plaintiff and against defendants should be correspondingly modified.

If counsel for the respective parties cannot agree and file written stipulation herein concerning the reimbursement to plaintiff, and the actual receipt by it of the balance of said special deposit and the fact of such payment can be established, then the defendant will be entitled to pursue such procedure in this case as will show any amount of money in addition to said $5,500.00 that plaintiff has received in the transaction concerning the dismissal of the four suits involved in this controversy.

Dated May 2, 1929.

PAUL J. MCCORMICK,
United States District Judge.

No. 6111

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BANK OF ITALY NATIONAL TRUST AND SAVINGS ASSOCIATION (a national banking association),

Appellant,

vs.

THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED (a national banking association), and HENRY P. HILLIARD, as Receiver thereof,

Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

INTRODUCTORY STATEMENT.

The introductory statement of the facts in appellant's opening brief is substantially correct. The statement however on page 5 of that brief that the court found that "the National Bank sold and converted said bonds of the Savings Bank and appropriated the proceeds thereof to its own use, and to the damage of the Savings Bank in the sum of $28,000" is not accurate. As to conversion the court found that the bank "sold and converted to its own use and benefit without the knowledge or consent of Merced Security Savings Bank or the City of Merced

the following described negotiable bonds, the then property of the Merced Security Savings Bank, to wit:" (Here follows description of the bonds.) (Trans. of Record, paragraph 6, p. 54.) This is not a finding that the appellees appropriated the *proceeds* of the bonds.

The only evidence in the record as to the transactions by which the appellees received and disbursed moneys in connection with the bond transaction is the testimony of W. C. Freeland beginning at page 80 of the transcript of record and ending at page 86 thereof, and continued again from page 87 to page 89 thereof. The following question was asked Mr. Freeland:

> "Q. From examination of those books and accounts I ask you whether or not the Farmers & Merchants Bank did receive or retain anything out of that transaction?
>
> A. It did not."
>
> (Trans. of Record, p. 81.)

It will be noted that there was an objection to the foregoing question only upon the ground that it is incompetent, irrelevant and immaterial, counsel stating in connection with the objection: "This is a matter of whether the Merced Security Savings Bank, the predecessor in interest of the plaintiff, sustained any loss by reason of this transaction rather than whether or not the party who was guilty of the conversion sustained a loss or received any benefit."

The evidence it would seem was clearly material, and there being no objection to the manner of making the proof, of course this court will consider the evi-

dence notwithstanding the objection and exception. The examination of Mr. Freeland following that question and answer demonstrates that the books of the bank were simply used by J. B. Hart, the treasurer of the City of Merced and at the same time manager of the bank, as a means of effecting his wrongful purpose, and not as a means of adding anything to the assets of the bank. The expression of the court in its written memoranda in connection with the decision of the case of course has no effect whatever upon the findings and judgment afterwards made and entered. The statement of counsel for appellant above quoted clearly defines appellant's contention with reference to the position of the appellee. That contention was that, even though appellee received no benefit from the transactions of its manager defendant appellee was responsible to appellant for any loss sustained by it. The contention of appellee was exactly the converse.

No finding of the court and nothing in the record supports the statement on page 5 of opposing counsel's brief that "The court further found that the sale and conversion of the bonds were not made in connection with the deposit of public funds in the Savings Bank and were not dependent upon or connected therewith in any way whatever." It clearly appears from the records of course that these transactions carried on by Mr. Hart, the city treasurer, and at the same time bank manager, were not necessary or proper in connection with the deposit in appellant bank, but those transactions are directly connected with and a part of Hart, treasurer, in connection with this city deposit in appellant bank.

I.

APPELLANT IS NOT ENTITLED TO REVIEW OF FINDINGS OF FACT.

It will be noted that appellant does not in its brief undertake to avail itself of any error in a ruling of the court made during the course of the trial. No motion or request for special findings was made by appellant at the conclusion of the trial or at any time. The appellee moved for judgment in his favor and against the plaintiff, and for special findings specifying the special matters requested to be found upon. (Trans. of Record, p. 31.)

Motion for judgment generally without any request or motion for special findings of fact was made by plaintiff and appellant. (Trans. of Record, p. 20.) Under this state of the record it seems that this court will not review any alleged errors except those in which rulings during the course of the trial were duly excepted to. Since appellant has not presented any matter of that class or discussed any alleged errors of the court during the course of the trial in its brief, it would seem that this court will not review the record. It is true that appellant quotes at length from the opinion of the trial court and rests its contention of error upon excerpts of that opinion. This court has said:

> "On the trial no exceptions were taken to any ruling of the court, and no request was made for special findings, or for a finding in favor of the defendant in the action. The plaintiff in error refers to the opinion of the court below as containing special findings of fact, but the opinion cannot be resorted to for that purpose.

> In the absence of a special finding, the judgment must be affirmed, unless the complaint fails to state a cause of action, or the bill of exceptions presents some erroneous ruling of the court in the progress of the trial. There being in the present case no ruling of the trial court, and no special finding of fact, but only a general finding, the latter must be accepted as conclusive, and this court can go no further than to affirm the judgment."
>
> *Northern Idaho & Montana Power Co. v. A. L. Jordan Lumber Co.,* 262 Fed. 765, 766;
>
> *China Press, Inc. v. Webb,* 7 Fed. (2d) 581, 582;
>
> *Wulfsohn et al. v. Russo-Asiatic Bank,* 11 Fed. (2d) 715.

Appellant in its brief has not attacked any finding made by the court. It has attacked conclusions of law which it based upon expressions of the trial court in his written opinion. Special findings were neither asked for nor made. The general finding therefore that the bonds were converted, and that they were of the value of $27,300, and that the plaintiff and appellant has been reimbursed in the sum of $20,547.02 is simply the general finding of the court and must be presumed by this court to be based upon the evidence in the case.

In connection with the payments made by the surety company the trial court found as follows (Trans. pp. 56, 57):

> "That subsequent to said September 20, 1926, and prior to February 1st, 1927, said Merced Security Savings Bank made proof to its claim

herein arising out of the facts alleged in said complaint for damages in the sum of $27,300 for the said conversion of said bonds, which said proof of claim was in writing, duly verified by the Cashier of said Merced Security Savings Bank and presented to said defendants for allowance and they did on or about February 1st, 1927, reject the said claim and have refused to allow the same or any part thereof or to pay anything thereon; that no part thereof has been paid except the sum of $20,547.02, which was paid by the Fidelity and Deposit Company of Maryland, the corporate surety upon the official bond of said J. B. Hart as City Treasurer, which said sum of $20,547.02 was so paid by said Fidelity and Deposit Company of Maryland to said plaintiff in the above-entitled action on the 23rd day of August, 1927; that there is unpaid upon the value of said securities the sum of $6752.98, no part of which has been paid by said defendants or either of them; that the balance unpaid upon the market value of said securities converted so as aforesaid at the time of said conversion is the sum of $6752.98.

That it is not true that a surety company paid and/or discharged all or any of the obligations of said J. B. Hart as City Treasurer of the City of Merced and of said surety company as his surety as such public officer to said Merced Security Savings Bank and/or to plaintiff herein other than said sum of $20,547.02; that it is not true that said Merced Security Savings Bank and/or said plaintiff has received from any surety company full pay and/or compensation for any and/or all losses sustained by them or either of them by reason of any or all of the

transactions of the said J. B. Hart as such Treasurer or in any manner whatsoever in connection with any and/or all of the bonds mentioned in the complaint filed in said action other than said sum of $20,547.02."

In its memorandum of decision on merits, page 28 transcript, the trial Court stated:

"There can be but one compensation for an injury or tort of the kind that is involved in this suit, which is the market value of the securities converted at the time of conversion, with interest thereon until judgment. The plaintiff has received partial compensation of its loss. It is immaterial from whom any portion of such damage is paid, but any payment on account thereof reduces the liability pro tanto."

The appellant has overlooked entirely the fact that the payments made by the Surety Company to appellant were found by the trial court to have been made on account of the damages sustained by appellant by reason of the conversion of the bonds. As previously shown, the appellant is in no position to attack these findings and this court must presume that the same were supported by the evidence.

II.

NO JUDGMENT SHOULD HAVE BEEN ENTERED IN FAVOR OF THE PLAINTIFF.

We believe the appellant was very fortunate indeed in recovering any judgment in this case. It will be borne in mind that the bonds were deposited with

J. B. Hart, as treasurer of the City of Merced, and as such treasurer he had full authority as far as the bank was concerned, over such bonds. As pointed out by the court in *Campbell v. Manufacturers' National Bank,* 81 Am. St. Rep. 438, 440:

> "The cashier is presumed to have all the authority he exercises in dealing with executive functions legally within the powers of the bank itself, or which are usually or customarily done, or held out to be done, by such an officer. But, the test of the transaction is whether it is with the bank and its business, or with the cashier personally and in his business: *Claflin v. Farmers' Bank,* 25 N. Y. 293; *Moores v. Citizens' Nat. Bank,* 111 U. S. 156. As to the former, all presumptions are in favor of its regularity and binding force. In the latter, no such presumption arises; in fact, upon proof that it was known to the claimant to be an individual transaction, and not one for the bank, the burden is cast upon the claimant to establish by proof that the act of the cashier thus done, for his own individual benefit, was authorized or ratified.
>
> These are fundamental principles applicable to principal and agent in every transaction arising out of that relation: (Citing cases.)"

We believe from the uncontradicted evidence in the case, and the only evidence on the point, that the use of the bank's books in these transactions was simply jugglery by Mr. Hart in appropriating the bonds and the proceeds of the sale thereof to his own use. In the case of *School District of Sedalia v. De Weese,* 110 Fed. 705, which has many points in common with the instant case, the court said:

> "* * * but the evidence shows, beyond question, that, as soon as the proceeds of those different sales were thus passed to the First National Bank of Sedalia, Thompson transferred them to his own individual account. This fact is clearly established by entries in the books of the bank, as also deposit slips and entries made in Thompson's individual pass book, put in evidence, from which the inference is clear that the credit received by the First National Bank for the proceeds was merely a matter of jugglery by Thompson, and passed over at once to the use and benefit of Thompson; and the practical result of the transactions was that Thompson got the benefit thereof, and not the bank."

In that case the court held that Thompson, as cashier and active managing officer of the bank, juggling the books of the bank in a transaction for his own benefit, was not in that transaction the agent of the bank, and his knowledge in that relation did not constitute knowledge of the bank. It will be kept in mind of course in this connection that the only evidence as to who obtained the benefit of the bond transaction in this case was that of W. C. Freeland, and he testified from an accurate examination and audit of the books that the bank gained nothing, and showed by the entries in the books of the bank caused to be made by Mr. Hart, that Mr. Hart covered the $25,000 transfer to appellant bank by juggling the books to show a sale by appellee bank of the bonds, when in fact no sale was made by the bank, and from the testimony of Mr. Freeland which stands alone on the point it appears clearly that Mr. Hart

had appropriated to his own use funds of the City which were covered by these various bond transactions.

We contended, and notwithstanding the memorandum opinion of the learned trial judge, still contend that since the whole transaction was a jugglery of the books of the bank and the use of the name of the bank by J. B. Hart, treasurer of the City of Merced, the bank gained nothing, and in fact had nothing whatsoever to do with the entire transaction, but the entire transaction was personal to J. B. Hart, as treasurer of the City of Merced. We do not make this contention at this time for the purpose of affecting the judgment as rendered by the court, but if our contention in this regard be right, then of course appellant was exceedingly fortunate in having any judgment entered in its favor and was certainly not in any way prejudiced.

In the case just cited the court further says:

> "An officer of a banking corporation has a perfect right to transact his own business at the bank of which he is an officer, and in such a transaction his interest is adverse to the bank, and he represents himself, and not the bank.
>
> It would be a far-reaching and dangerous doctrine to establish, when the cashier of a bank, acting in his individual capacity, and for his own aggrandizement, receives in trust, as the agent of a third party, property or money, that because he is at the time cashier and active manager of the bank and, as a mere matter of bookkeeping (done doubtless, to cover up his own fraud), he first enters the proceeds on the books of the bank

to the bank's credit and immediately passes the same to his own individual account, and forthwith checks the same out to his individual use, the bank should be affected with his guilty knowledge, and made to account for the fruit of his ill-gotten gains, when in point of fact the bank gained nothing in the end by the transaction. The bank in such case is not acting in privity with the agent of the third party. Thompson in these whole transactions was acting as the agent of the bank."

In the case of *Lamson v. Beard,* 94 Fed. 30, 41, the court very aptly characterizes the transactions of Mr. Hart in the case at bar:

"While the transactions appeared upon the books, as stated in the findings, it is a misuse of words, and inconsistent with honest thought, to say that they were known to the bank. Possession of facts, in books purposely kept in a manner to conceal the truth, is not, in law or morals, knowledge of the facts. Cassatt alone had knowledge of the truth, and, though he was president, his knowledge of his own frauds, perpetrated for his individual purposes, was not attributable to the bank."

III.

THE ACTION WAS FULLY COMPROMISED AND SETTLED.

Before this action was commenced J. B. Hart, treasurer of the City of Merced, and manager of appellee bank during the bond transaction under question, died. His wife, Etta Minerva Hart, and

George Eganhoff, were appointed administrators of his estate. The City of Merced brought an action against Fidelity & Deposit Company of Maryland, a corporation, and Etta Minerva Hart and George Eganhoff, administrators of the estate of Hart. The testimony in connection with these transactions appears from the testimony of witness F. W. Henderson, as follows:

> "The Fidelity and Deposit Company of Maryland paid to the City of Merced $11,000.00 in cash and subsequent to that time the Bank of Italy paid to the City of Merced the amount that is mentioned in this letter which includes interest, in all $15,047.02. Those payments were made on account of the suit that you have spoken of here that is referred to and also on account of the suit that the City of Merced brought against the Merced Security Savings Bank and which suit involved the balance of the deposit that had been made by J. B. Hart as Treasurer with the Merced Security Savings Bank. This compromise was devised for the purpose of settling both suits referred to and also suits were brought by Merced Security Savings Bank against the City of Merced which involved the bonds in question.
>
> There were four suits in all."
>
> (Testimony of F. W. Henderson, Trans. of Record, p. 79.)

Thus it will be seen that the estate of J. B. Hart was sued for a recovery of the claims of the appellant here growing out of the bond transaction. A suit was brought by the City of Merced against the predecessor of appellant bank. Two other suits were instituted in connection with the same transaction.

The settlement effected between Fidelity & Deposit Company of Maryland, the official bondsman of J. B. Hart, constituted a compromise of all of those suits and a settlement thereof.

> "Those payments were made on account of the suit that you have spoken of here that is referred to and also on account of the suit that the City of Merced brought against the Merced Security Savings Bank and which suit involved the balance of the deposit that had been made by J. B. Hart as Treasurer with the Merced Security Savings Bank. This compromise was devised for the purpose of settling both suits referred to and also suits were brought by Merced Security Savings Bank against the City of Merced which involved the bonds in question."
>
> (Testimony of F. W. Henderson, Trans. of Record, p. 78.)

Referring to the four cases just adverted to in this brief involving all of these transactions in reference to the bonds, the deposit of city moneys with the appellant bank and the misappropriation of the bonds and of moneys by J. B. Hart, Mr. Henderson testified:

> "All of those transactions that you have referred to (four in number) were dismissed on the consummation of the settlement between the various parties."
>
> (Trans. of Record, p. 80.)

We should state here that the testimony of Mr. Henderson as to the compromise and settlement of those cases was all of the testimony received on that point. The evidence therefore stands uncontradicted that the four suits involving all of these transactions

in which the City of Merced, the predecessor in interest of appellant bank, Fidelity & Deposit Company of Maryland, surety on the official bond of J. B. Hart, and the J. B. Hart estate, were fully compromised and settled between all of the parties upon the payment by the official surety of J. B. Hart, Fidelity & Deposit Company, of the sum credited by the court in the action. The consummation of that settlement is to be found in a letter of Fidelity & Deposit Company to Mr. Louis Ferrari, vice-president of the Bank of Italy, the Bank of Italy being the owner of appellant bank. That letter agreed to pay to appellant bank, appellant bank to pay the amount to the City of Merced, the sum of $15,047.02. Further, the surety company agreed to pay to appellant bank the sum of $5500.00. There was involved in one of the four suits certain warrants aggregating the sum of $3027.62, which by letter it was agreed the Surety Company should protect the city against, and the letter stated with reference to that item that the Surety Company would "pay you one-half of any saving which we may make on the claim of the receiver against the city. It is to be understood, however, that we reserve the right to pay the claim in full, or to make any adjustment we think best."

Thus it appears that the bank by this arrangement was to make one-half of any profit that the Surety Company might avail to itself in defeating the claim of the receiver against the city upon any of those warrants. It will be noticed that this Surety Company, upon the official bond of Mr. Hart recognizing its liability to the city for all of the defalcations in

money and bonds made by Hart, as city treasurer, based its settlement with appellant bank upon the following:

> "We understand you will at once bring suit against the Receiver of the Farmers & Merchants Bank for the value of the bonds misappropriated by that bank, and that in consideration of the payments made to you you will, if successful, pay to us one-half of the net proceeds of that suit after deducting all costs, expenses and attorneys fees. In case either you or we are reimbursed in full for any loss then the other party shall be entitled to the balance of the net proceeds until it is fully reimbursed."
>
> (Trans. of Record, pp. 97 and 98.)

In other words, the Fidelity and Deposit Company of Maryland, as official bondsman for J. B. Hart, as treasurer of the City of Merced, adjusted with appellant bank and the City of Merced all of the claims of the City of Merced against J. B. Hart or against his estate upon payment to appellant bank of the sum of $20,547.02, leaving a net loss to appellant bank of the difference between that amount and $27,300.00, or a net loss of $6752.98.

Notwithstanding the obligation of Hart's surety to reimburse the city for all losses sustained by it by reason of defalcations of Hart it asked the appellant bank to go into court asking for a judgment of $27,300.00 when its loss at that time was only $6752.98; so that the surety company could recover back from appellee the moneys paid out under its bonds for the defalcations of Mr. Hart, after having been instrumental in fully settling and compromising all claims

of the City of Merced and the appellant bank against the estate of the deceased, defaulting city treasurer and bank manager, J. B. Hart. This it would seem would very naturally be obnoxious to man's sense of fairness and certainly would be frowned upon by courts and condemned by the law.

Pursuant to that arrangement, however, this action was instituted. Appellant bank sought to recover for the benefit of the surety company and itself, the entirety of all of its losses after having been reimbursed in the sum of $20,547.02 of that loss by the surety company obligated to pay that loss. It will be kept in mind of course that in consummating this "compromise and settlement" of all of these cases the real wrong-doer, J. B. Hart and his estate, were released from any obligation to reimburse the creditors of appellee bank for the losses sustained by it through Hart's transactions. It would appear upon the face of this sort of transaction that a court of justice would not make itself a party to the consummation sought by the parties to the compromise and settlement.

In the case of *Chetwood v. California Nat. Bank,* 113 Cal. 414, the court said:

> "While the plaintiff may sue one or all of joint tort feasors and while he may maintain separate actions against them, and cause separate judgments to be entered in such actions, he can have but one satisfaction. Once paid for the injury he has suffered, by any one of the joint tort feasors, his right to proceed further against the others is at an end. Where several joint tort feasors have been sued in a single action, a retraxit of the cause of action in favor of one of

them operates to release them all. The reason is quite obvious. By his withdrawal, plaintiff announces that he has received satisfaction for the injury complained of, and it would be unjust that he should be allowed double payment for the single wrong. It matters not, either, whether the payment made was in a large or in a small amount. If it be accepted in satisfaction of the cause of action against the one, it is in law a satisfaction of the claim against them all."

Where a case was dismissed as to one joint tort feasor with an express reservation of the right to proceed against the remaining tort feasors, the court quoted with approval from the case just above cited, and said:

"I think in view of the broad and sweeping language of the supreme court in the case last quoted, it is clear that the release in question, notwithstanding its saving clauses, is a discharge not only of Manson but of his codefendants, Casey and Van der Naillen.

In addition to the authorities referred to in the foregoing opinion, there are a number of cases in other jurisdictions, constituting the weight of authority, which hold that a reservation in a release to one of several tort-feasors does not operate to hold the others. Such a provision, says the court in *Gunther v. Lee*, 45 Md. 60 (24 Am. Rep. 504), 'is simply void as being repugnant to the legal effect and operation of the release itself."

It would seem therefore that the compromise and settlement, and dismissal of the four actions hereinabove mentioned, for the consideration paid by the Fidelity & Deposit Company, surety for J. B. Hart,

one of the tort feasors, if the bank may be held to have had anything to do with the bond transaction, completely satisfied the claim of appellant bank, and its recovery of a judgment for the part of its loss that was not paid by way of settlement with Hart and Hart's estate and the City of Merced, should be a matter of delight to it rather than complaint by it.

CONCLUSION.

In conclusion we wish to state that we have carefully examined the cases cited in appellant's brief and find that none of them is applicable either to the facts as shown by the evidence or findings of fact of the trial court.

It is true that there was no privity between the Surety Company and the Farmers and Merchants National Bank of Merced. However, there was privity between the Surety Company and J. B. Hart and the estate of J. B. Hart. As stated in appellant's brief (p. 9) J. B. Hart and the National Bank were joint tort feasors. It was by reason of that privity that the Surety Company paid to the appellant in excess of $20,000.00 on account of the loss sustained by appellant by reason of the conversion of the bonds by Hart.

Dated, Fresno,
October 1, 1930.

Respectfully submitted,
HARTLEY F. PEART,
M. G. GALLAHER,
GILBERT H. JERTBERG,
Attorneys for Appellees.

No. 6112

United States

Circuit Court of Appeals

For the Ninth Circuit.

SWIFT AND COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of West Virginia,

Appellant,

vs.

FREDA DALY, as Administratrix of the Estate of STEWART DALY, Deceased,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States in and for the District of Montana.

No. 507.

FREDA DALY, as Administratrix of the Estate of STEWART DALY, Deceased,
Plaintiff,

vs.

SWIFT & COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of West Virginia,
Defendant.

BE IT REMEMBERED that on April 13th, 1929, plaintiff filed its complaint herein in the words and figures following, to wit: [1*]

In the District Court of the United States in and for the District of Montana.

No. ——.

FREDA DALY, as Administratrix of the Estate of STEWART DALY, Deceased,

Plaintiff,

vs.

SWIFT & COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of West Virginia,

Defendant.

COMPLAINT AT LAW.

The plaintiff complains and alleges:

I.

That at all times herein mentioned the defendant Swift & Company was and now is a corporation organized and existing under and by virtue of the laws of West Virginia, a citizen of West Virginia and doing business in Montana engaged in the refrigeration, packing and selling of meats and particularly at its packing plant at 724 South Arizona Street in Butte, Silver Bow County, Montana.

*Page-number appearing at the foot of page of original certified Transcript of Record.

II.

That the plaintiff is a citizen and at all times herein mentioned was a citizen of the State of Montana and this action at law is entirely between citizens of different states, to wit, the defendant, which is a citizen of the State of West Virginia and plaintiff, who is a citizen of Montana, and the amount involved in this action at law, exclusive of interest and costs is in excess of the sum of Three Thousand ($3,000.00) Dollars, to wit, it is the sum of Twenty Thousand ($20,000.00) Dollars.

III.

That on or about the 28th day of August, 1928, Stewart [2] Daly died a resident of Silver Bow County, Montana, of the age of 11 years, 8 months and 22 days, and no older. That thereafter, and on the 13th day of April, 1929, by an order and judgment duly given and made by and in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, Freda Daly, mother of said Stewart Daly, was appointed administratrix of the estate of Stewart Daly, deceased, she thereupon qualified by taking oath and giving bond as required by law and such order, letters of administration thereupon on said 13th day of April, 1929, were duly issued to her, and such letters have not been revoked; she is the administratrix of the estate of Stewart Daly, deceased.

IV.

That at all times herein mentioned the defendant

Swift & Company owned a certain packing plant of two stories and basement, a building at 724 South Arizona Street in the City of Butte, Silver Bow County, Montana, and had many servants working therein and occupied, controlled, possessed, and packed meats in, the said packing plant.

That there was in the basement thereof, about the 1st day of August, 1928 (and until the work of removing the same herein described), the property of, and in use by defendant, an ice-making plant, consisting of many pieces put together of iron or steel, some pieces of which weighed as much as 1350 pounds. That for the purpose of improving its plant and business, Swift & Company desired to install in said basement a better ice plant, and in order to do so desired to have the old ice plant removed from its building in order to make room for the new one contemplated. That defendant bought of York Ice Machine Company a new plant, and as part of the conditions of purchase, the exact terms of which are unknown to plaintiff, [3] York Ice Machine Company engaged with Swift & Company to remove the old plant, up and out of the building by the only possible exit for the same, a certain freight elevator, such being the only exit without boring the wall of the building, which was not agreed to by Swift & Company.

VI.

That while carrying on the design and desires of Swift & Company to get the old ice-making plant out of its basement York Ice Machine Company

sold the said plant to one David Mottleson, a junk dealer, for $15.00 on condition that he would remove the old plant up through the elevator and out of the building. That though perhaps, York Ice Machine Company and Mottleson were so-called independent contractors (and plaintiff is ignorant of the exact terms of the contract between York Ice Machine Company and Swift & Company, and of the terms of the contract between Mottleson and York Ice Machine Company), yet at all times both Mottleson and York Ice Machine Company were, in making the said contracts and in doing the work hereinafter set out, furthering solely and entirely the plan of work and the business desires and designs of defendant, Swift & Company in its premises, in its plant, at all times occupies, owned, controlled and possessed by it, the defendant, and in which it was carrying on its business and intending to carry on its business thereafter and such work was for the purpose of improving the business methods of Swift & Company.

VII.

That pieces of the old ice plant weighed and were known by Swift & Company to weigh as much as 1350 pounds; that the elevator was one of unusual design and mechanism and due care required and demanded that one trained in the handling of said elevator be always controlling the same while such elevator was in use lifting such machinery; that the said elevator started with a jump and jerk and could not be quickly brought [4] to a stop and

unless the rope of control were "pulled" "far enough" the motor would burn out, the same being run by rope control and electric power, and such condition of such elevator was known to Swift & Company, and it negligently advised Mottleson before he used the elevator at all to be sure to pull the rope "far enough"; that Swift & Company, negligently failed to warn Mottleson of the tendency of the said elevator to start with a jerk and jump and negligently failed to warn him that it could not be brought to a quick stop, and negligently failed to place any trained man in control of said elevator while the old machinery was being lifted as herein set out until after the injury to Stewart Daly hereinafter alleged. That to do such work a crew of four or more grown men, skilled in such work was needed for the preservation of the safety of all concerned in it, that Swift & Company knew it was being done, and negligently permitted it to be done, with only two men and the child, Stewart Daly.

That the work of removing the said old ice plant up the freight elevator was inherently and intrinsically of greatest danger to all persons concerned about the work, even if due and extraordinary care were exercised, and the duty of Swift & Company, as owner, occupier, possessor, user of said plant to use due care, for the safety of all invitees into its premises of which Stewart Daly was one, in the prosecution of such work in the furtherance of its business was a nondelegable one, whether Swift & Company did the same by hired servants or con-

tractor or subcontractor. That such work so being prosecuted by Swift & Company on its premises constituted and was an attractive but dangerous nuisance to active boys of the age of Stewart Daly, that Swift & Company negligently failed to prevent his access to such place of danger and in fact negligently and impliedly invited him into the same and [5] knowing for several days of his presence there, negligently failed to exclude him.

VIII.

That on Monday, the 20th day of August, 1928, Stewart Daly (without any knowledge of either of his parents of the kind or character of work which he was doing, or the place where he was working, until after the injury hereinafter set out), was employed as a casual servant of David Mottleson and was an invitee of Swift & Company into and about the said basement and elevator shaft and elevator and worked daily and continuously from Monday, the 20th day of August, 1928, until Friday, the 24th day of August, 1928, in helping to remove said machinery up the elevator shaft by means of the freight elevator in the premises of Swift & Company.

IX.

That continuously eight hours each day or thereabouts from Monday, the 20th day of August, 1928, until Friday, the 24th day of August, 1928, Swift & Company being engaged in business in Montana, knowingly and negligently and wrongfully and unlawfully permitted to be employed and to render

and perform services and labor in, on, and about a certain freight elevator in its plant at 724 South Arizona Street in Butte, Silver Bow County, Montana, Stewart Daly, a child under the age of 16 years, to wit, of the age only of 11 years 8 months and 22 days, and the said elevator being in operation constantly during such time, and such employment and service and labor of the said child, Stewart Daly, being at all times, until after he was injured, unknown to Philip Daly the father of the said child and unknown to the mother this administratrix, and such conduct of Swift & Company was a proximate and efficient and a direct cause of the injury to Stewart Daly, hereinafter set out, and the elevator in motion overturned on Stewart Daly the [6] half fly-wheel and so injured him that he died after lingering about three days.

X.

That on Friday, the 24th day of August, 1928, in the course of said work, half of the fly-wheel, the said half weighing about 1350 pounds, was being loaded on said elevator and the same was ends up resting on its circumference projecting over the elevator shaft, and Stewart Daly was helping to steady the said fly-wheel, and while David Mottleson (entirely unskilled and known by the defendant to be unskilled in handling the said elevator, or the defendant could, in the exercise of ordinary care have known that Mottleson was unskilled) was driving it, the said elevator started with a jerk from some distance below the floor whereon the

said half fly-wheel was resting, and without power in Mottleson to stop the same at the floor it jumped past the floor, struck the fly-wheel, turned it over on the foot of Stewart Daly and crushed the same; that Stewart Daly was thereby grievously injured and such injury was due to the negligent and unlawful acts of the defendant hereinbefore set out; that Stewart Daly was immediately after such injury given all possible and reasonable and skillful medical and surgical attention, but due to such injury, infection set into the leg and such injury along with, and as a cause and medium of such infection, caused the death of Stewart Daly three days later; that such injuries and such negligent and unlawful conduct of the defendant, Swift & Company caused Stewart Daly during his lifetime great pain and suffering of mind and body, and completely destroyed for all time Stewart Daly's capacity to earn money; that Stewart Daly was a healthy, strong, active, earnest and energetic good boy; that he lived (and he would have lived 47.45 years but for the acts of the defendant) after he became 21 years of age he would have earned for himself [7] much money, to wit, at least the ordinary wages paid in Butte, Montana, for ordinary labor, that is to say, more than $5.00 per day thirty days per month; that he would have enjoyed, but for the acts of the defendant, a long useful and happy life, and earned much money of his own above his needs for living, after he became 21 years of age.

XI.

That Stewart Daly survived the said injuries three days and during his lifetime had a cause of action against the defendant by virtue of the facts hereinbefore set out, that such cause of action was never prosecuted during his lifetime; that under the laws of Montana it survives to his administratrix, this plaintiff.

XII.

That the defendant by reason of the acts herein set out damaged Stewart Daly and caused him loss in the sum of Twenty Thousand ($20,000.00) Dollars, no part of which has ever been paid.

WHEREFORE, this plaintiff demands judgment against the defendant for the sum of $20,000.00 and interest from August 28th, 1928, and for her costs of suit.

MAURY, BROWN & MAURY,
Attorneys for Plaintiff.

FREDA DALY,
Plaintiff. [8]

State of Montana,
County of Silver Bow,—ss.

Freda Daly, being first duly sworn on her oath, deposes and says, that she is the plaintiff named in the foregoing complaint; that she has read the same and knows the contents thereof, and that the same is true of her own knowledge, except those matters stated on information and belief and as to those she believes them to be true.

FREDA DALY.

Subscribed and sworn to before me this 13th day of April, 1929.

[Notarial Seal] JOSEPHINE BLAKE,
Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires June 25, 1929.

Filed April 13, 1929.

THEREAFTER, on May 4th, 1929, defendant's demurrer to the complaint was filed herein in the words and figures following, to wit: [9]

[Title of Court and Cause.]

DEMURRER TO COMPLAINT.

The defendant demurs to the complaint herein and for grounds of demurrer alleges:

1.

That the complaint does not state facts sufficient to constitute a cause of action.

2.

That the complaint is uncertain in this:

A. It alleges that Stewart Daly was employed on the premises and also alleges that he was an invitee on the premises.

B. The complaint alleges that the York Ice Company contracted to remove the old ice plant, install a new plant and that the York Ice Company sold the old plant to one David Mottleson. A

showing of the relation of independent contractor yet the complaint alleges that the injuries to Daly were caused by the defendant and that the defendant wrongfully permitted Daly to be employed.

C. The complaint alleges defects in the elevator causing the injuries and in another place alleges that the negligence of Mottleson in operating the elevator caused the injuries and in another place alleges that the defendant failed to instruct Mottleson in the use and operation of the elevator. [10]

D. It cannot be determined who the plaintiff alleges caused the injuries, whether the York Ice Company, Mottleson or the defendant.

E. The complaint alleges that Mottleson purchased the old ice plant from the York Ice Company and agreed to remove the plant yet also alleges that the defendant in the exercise of ordinary care should have known Mottleson was unskilled in operating the elevator thereby alleging Mottleson to be the servant or agent of the defendant and it cannot be determined whether the plaintiff means to allege the relation of independent contractor on the part of the York Ice Company and Mottleson or either of them, or whether they or either of them were the servants, agents or employees of the defendant or whether the defendant is to be liable for defective machinery or for negligence of its agents or servants, if any.

3.

That said complaint is ambiguous for each of the reasons it is uncertain.

4.

Said complaint is unintelligible for each of the reasons it is uncertain.

A. C. McDANIEL,
JOHN K. CLAXTON,
Attorneys for Defendant.

Service of the foregoing demurrer to complaint admitted and copy received this 3d day of May, 1929.

MAURY, BROWN and MAURY,
Attorneys for Plaintiff.

Filed May 4, 1929. [11]

THEREAFTER, on May 14, 1929, minute entry on order overruling defendant's demurrer was duly entered herein in the words and figures following, to wit: [12]

[Title of Court and Cause.]

MINUTES OF COURT—MAY 14, 1929—ORDER OVERRULING DEMURRER.

Counsel for respective parties present in court, H. L. Maury, Esq., appearing for the plaintiff, and A. C. McDaniel, Esq., appearing for defendant. Thereupon defendant's demurrer was called up and argued by counsel, and submitted to the Court, being filed by plaintiff. Thereafter, the Court, after due consideration, ordered that said demurrer be and is overruled.

Entered in open court this 14th day of May, 1929.

C. R. GARLOW,
Clerk.

THEREAFTER, on May 24th, 1929, answer was filed herein in the words and figures following, to wit: [13]

[Title of Court and Cause.]

ANSWER.

The defendant answering the complaint admits, denies and alleges:

1. The defendant admits: The allegations of Paragraphs one, two and three of the complaint; that the defendant owned a certain building or packing plant in the city of Butte, Montana, and had servants working therein, and occupied, controlled, possessed, and packed meats in, said building; that on or about the 1st day of August, 1928, the defendant had in the basement of said building a certain ice-making plant made of iron and steel; that the defendant desired to have installed in said building another ice plant, and to have the old ice plant removed; that the defendant purchased of York Ice Company another ice plant, and as a part of the terms of such purchase the York Ice Company agreed to remove the old plant out of said building, and alleges that as a part of said transaction the said old ice plant was sold to said

York Ice Company; that said York Ice Company sold said old ice plant to one David Mottleson for $15, and as part of the terms of such sale and purchase the said Mottleson agreed with said York Ice Company to remove said old ice plant out of said building; that the elevator in said building was run by a rope and electric power; that on the 20th day of August, 1928, said Stewart Daly was employed as the servant of said Mottleson and continued in the service of said Mottleson until August 24, 1928; that the portion of the fly-wheel about to be put on said elevator projected over the elevator shaft; that said Stewart Daly died on the 28th day of August, 1928; that no sum has been paid plaintiff.

2. Save and except as herein specifically admitted, the defendant denies each and every allegation and all of the allegations of said complaint.

3. Admits that Stewart Daly was injured. [14]

For an affirmative defense, defendant alleges:

1. That said Stewart Daly from August 20, 1928, to August 24, 1928, was employed by said David Mottleson; that in the course of his employment said Stewart Daly took orders from said Mottleson only, and worked with and under said Mottleson, and they, said Daly and Mottleson, were engaged in the same work, namely, removing the said old ice plant; that in the course of their said work they placed a portion of the fly-wheel of said old ice plant (which old ice plant was owned by said David Mottleson, and he was engaged in the performance of labor for himself) so that it projected into the elevator

shaft in such a manner that it could and would be struck by the elevator when the elevator was in operation; that while said portion of the fly-wheel was in such position the said Mottleson, in some manner unknown to the defendant, without authority operated said elevator so that it struck said fly-wheel and caused it to fall; that any injuries inflicted upon the said Stewart Daly were caused by the said negligence of a fellow-servant, his own employer and coservant.

WHEREFORE, defendant having fully answered prays judgment that the plaintiff take nothing by this action, and that defendant be dismissed hence with its costs.

JOHN K. CLAXTON,
A. C. McDANIEL,
Attorneys for Defendant. [15]

State of Montana,
County of Silver Bow,—ss.

John K. Claxton, being first duly sworn, says: That he is one of the attorneys for the within named defendant, and makes this verification for and on behalf of said defendant for the reason that no officer of said defendant corporation is within the county of Silver Bow, Montana; that he has read the said answer and knows the contents thereof; that the matters stated in said answer are true to his best knowledge, information and belief.

JOHN K. CLAXTON.

Subscribed and sworn to before me May 23, 1929.

[Notarial Seal] CARL J. CHRISTIAN,
Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires Mar. 14, 1931.

Service of the foregoing answer acknowledged and copy received May 23, 1929.

MAURY, BROWN & MAURY,
Attorneys for Plaintiff.

Filed May 24, 1929.

THEREAFTER, on May 28, 1929, reply was filed herein in the words and figures following, to wit: [16]

[Title of Court and Cause.]

REPLY.

The plaintiff for her reply to the answer of the defendant and to the affirmative defense therein admits, alleges and denies, as follows:

I.

Admits that Stewart Daly between August 20th, 1928, and August 24th, 1928, was employed by David Mottleson.

Admits that he took orders from David Mottleson, and worked with and under said Mottleson, and that they, said Daly and Mottleson, were engaged in the work of removing the old ice plant; within the course of the work they placed a por-

tion of the fly-wheel of the said ice plant so that it projected into the elevator in such a manner that it could and would be struck by the elevator when the elevator was in operation, and that the elevator struck the fly-wheel and caused it to fall.

Admits that Stewart Daly was a coservant of Swift & Company with David Mottleson.

Denies generally each and every allegation in the said affirmative defense save such as are hereinbefore specifically admitted.

WHEREFORE, having fully replied she prays for judgment [17] in accordance with the prayer of her complaint.

MAURY, BROWN & MAURY,
Attorneys for Plaintiff.

State of Montana,
County of Silver Bow,—ss.

Freda Daly, being first duly sworn on her oath, deposes and says, that she is the plaintiff named in the foregoing complaint; that she has read the same and knows the contents thereof, and that the same is true of her own knowledge.

FREDA DALY.

Subscribed and sworn to before me this 25 day of May, 1929.

[Notarial Seal]

DOMITRE A. BATCHOFF,
Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires Aug. 8th, 1930.

Service of the above and foregoing reply admitted and copy received this 28th day of May, 1929.

A. C. McDANIEL and
JOHN K. CLAXTON,
Attorneys for Defendant.

Filed May 28, 1929.

THEREAFTER, on December 23, 1929, said cause was duly tried, the record of said trial being in the words and figures following, to wit: [18]

[Title of Court and Cause.]

TRIAL.

This cause came on regularly for trial this day, Messrs. Maury, Brown and Maury, appearing for the plaintiff, and J. K. Claxton, Esq., and A. C. McDaniel, Esq., appearing for the defendant herein.

Thereupon the following named persons were duly impanelled, accepted and sworn as a jury to try the cause, viz.:

Paul MacDonald, T. F. Riley, John Sanders, B. F. Penn, Lee Reece, W. W. Harper, Chas. Savant, Thos. E. Elliott, J. W. Whitehead, Chas. Wilson, M. A. Fulmore and John Eathorne.

Thereupon Frank J. Williams, Dave Mottleson, Freda Daly, Phil Daly, Joe Coppo and John Visnes were sworn and examined as witnesses on behalf of plaintiff and a certain offer of proof was submitted to the Court, which offer of proof was

denied and exception of plaintiff noted, whereupon plaintiff rested.

Thereupon defendant moved the Court to grant a nonsuit and for dismissal of the complaint for lack of proof to show any liability on the part of Swift and Company, which motion was duly argued and submitted and by the Court denied, the exception of the defendant being duly noted.

Thereupon T. J. McKinley, W. G. Young, Reynold J. McDonald, F. R. Jones, Walter J. Ritchie and Oscar Henderson were sworn and examined as witnesses for defendant and Dave Mottleson was recalled and testified as a witness for defendant, and Plaintiff's Exhibit No. 1, being a certain blueprint diagram of the basement of the Swift and Company plant in Butte, Montana, offered and admitted, whereupon defendant rested.

Thereupon after the arguments of counsel, the plaintiff moved the Court to pre-emptorily instruct the jury to return a verdict for plaintiff, which motion was duly granted, whereupon after the instructions of the Court the jury retired to consider of their verdict. Thereafter the jury returned into court with the following verdict, viz.:

> "We, the jury in the above entitled cause do find our verdict in favor of the plaintiff above named, Freda Daly, as Administratrix of the Estate of Stewart Daly, Deceased, and against the defendant, above named, Swift & Company, a corporation, and do assess the plaintiff's dam-

age in the sum of ($5,000.00) Five Thousand Dollars.

M. A. FULMORE,
Foreman."

Thereupon judgment ordered entered accordingly. Thereupon on motion of defendant, Court ordered that said defendant be granted 20 days additional time within which to prepare, serve and file a bill of exceptions herein.

Entered in open court this 23d day of December, 1929.

C. R. GARLOW,
Clerk. [19]

THEREAFTER, on December 23, 1929, verdict of the jury was duly filed herein in the words and figures following, to wit: [20]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled cause, do find our verdict in favor of the plaintiff above named, Freda Daly as administratrix of the estate of Stewart Daly, deceased, and against the defendant, above named, Swift & Company, a corporation, and do assess the plaintiff's damage in the sum of ($5,000.00) Five Thousand Dollars.

M. A. FULMORE,
Foreman.

Filed Dec. 23, 1929.

THEREAFTER, on December 24th, 1929, judgment was duly entered herein in the words and figures following, to wit: [21]

In the District Court of the United States, in and for the District of Montana.

FREDA DALY, as Administratrix of the Estate of STEWART DALY, Deceased,
Plaintiff,

vs.

SWIFT & COMPANY, a Corporation,
Defendant.

JUDGMENT.

BE IT REMEMBERED, that this cause came on for trial before the Court and the jury on the 23d day of December, 1929; plaintiff was represented by her counsel, Messrs. Maury Brown & Maury, the defendant by its counsel, John K. Claxton and A. C. McDaniel, Esqrs.; witnesses were sworn and testified on behalf of the plaintiff and the defendant and after the evidence was closed the cause was argued to the jury by counsel for each of the parties, and thereupon the jury was charged by the Court as to the law; thereupon the jury retired to consider of their verdict and thereafter returned into court with their verdict, which is in words and figures following, to wit:

(After title of Court and Cause.)

"We, the Jury in the above-entitled cause, do find our verdict in favor of the plaintiff

above named Freda Daly, as administratrix of the estate of Stewart Daly, deceased, and against the defendant above-named Swift & Company, a corporation, and do assess the plaintiff's damages in the sum of ($5,000.00) Five Thousand Dollars.

M. A. FULMORE,
Foreman."

WHEREFORE, by reason of the law and the premises and the verdict of the jury as aforesaid, it is ORDERED, DECREED AND ADJUDGED and this does ORDER, DECREE AND ADJUDGE, that Freda Daly, as administratrix of the estate of Stewart Daly, deceased, do have and recover of and from Swift & Company, a corporation, the defendant above named, the sum of Five Thousand ($5,000.00) Dollars, together with interest thereon from the 24th day of [22] December, 1929, at the rate of eight per cent per annum, and for her costs of suit hereby taxed at the sum of Forty-six and 20/100 Dollars, and that such sum bear like interest.

Dated and entered this 24th day of December, 1929.

C. R. GARLOW,
Clerk.
By L. R. Polglase,
Deputy Clerk.

THEREAFTER, on January 13, 1930, petition for new trial was filed herein in the words and figures following, to wit: [23]

[Title of Court and Cause.]

PETITION FOR A NEW TRIAL.

The defendant in the above-entitled action respectfully petitions the Court for a new trial in said cause upon the following grounds and for the following causes, each of which materially affects the substantial rights of the defendant:

I.

Errors at law occurring at the trial as follows:

1. The Court erred in overruling the demurrer to the complaint.

2. The complaint does not state facts sufficient to constitute a cause of action.

3. The Court erred in denying the motion for a nonsuit.

II.

Insufficiency of the evidence to justify the verdict.

In this connection the petitioner sets forth the following particulars wherein the evidence is claimed to be insufficient:

1. The negligence of David Mottleson is the efficient, proximate cause of the injury to Stewart Daly, not any negligence of the defendant,—the negligence of Mottleson in operating the elevator and the negligence in so placing the half portion of

the fly-wheel where it could be struck by the elevator; and in employing Stewart Daly, to work at Swift's plant.

2. The evidence fails to show any notice or knowledge on the part of the defendant that Stewart Daly was working on the premises of the defendant.

3. The evidence fails to show that the defendant permitted Stewart [24] Daly to work on its premises.

4. The evidence fails to show that Stewart Daly was employed by the defendant, but on the contrary shows that Stewart Daly was employed by David Mottleson, an independent contractor, to do the work of David Mottleson.

5. The evidence of the plaintiff shows contributory negligence on the part of Stewart Daly in putting himself in close proximity to the fly-wheel, which he was not assisting to move, which contributory evidence was not explained away by the plaintiff.

6. The evidence shows that David Mottleson is the one guilty of negligence *per se,* in that he is the one who employed Stewart Daly to work, that Mottleson is the one who violated the statute, and is the prime or first mover in a course of events which led to the injury of Stewart Daly.

The petition for a new trial is made and based upon the pleadings and papers on file, and upon the minutes of the court in said cause, including instructions given, and proceedings had, and testimony taken in said trial of said cause, which pro-

ceedings are embodied in a bill of exceptions heretofore presented for settlement.

JOHN K. CLAXTON,
A. C. McDANIEL,
Attorneys for Defendant.

Service of the foregoing petition acknowledged and copy received January 13th, 1930.

MAURY, BROWN & MAURY,
LOWNDES MAURY,
R. LEWIS BROWN,
Attorneys for Plaintiff.

Filed Jan. 13, 1930.

THEREAFTER, on January 24, 1930, minute entry on order denying petition for new trial was duly entered herein in the words and figures following, to wit: [25]

[Title of Court and Cause.]

MINUTES OF COURT—JANUARY 24, 1930—
ORDER DENYING PETITION FOR NEW TRIAL.

This cause heretofore submitted to the Court on defendant's petition for a new trial came on regularly at this time for decision. Thereupon, after due consideration, Court ordered that the petition be and is denied.

Thereupon, bill of exceptions as presented was signed and ordered filed.

Entered in open court January 24, 1930.

C. R. GARLOW,
Clerk.

THEREAFTER, on January 24, 1930, bill of exceptions was duly filed herein in the words and figures following, to wit: [26]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, That this cause came on regularly for trial before the Honorable George M. Bourquin, Judge of the District Court of the United States for the District of Montana, sitting with a jury, on the 23d day of December, A. D. 1929, Messrs. Maury & Brown appearing as counsel for the plaintiff and John K. Claxton and A. C. McDaniel appearing as counsel for the defendant; and that the following proceedings were had, orders and exceptions hereinafter appearing, had and taken therein, the following being all of the testimony and evidence offered or introduced on the trial of this cause, to wit: [27]

TESTIMONY OF FRANK J. WILLIAMS, FOR PLAINTIFF.

FRANK J. WILLIAMS, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

The WITNESS.—My name is Frank J. Williams; live at 720 West Granite Street, Butte, Montana; am a physician and surgeon by profession, a graduate of the Chicago College of Medicine and Surgery.

Mr. CLAXTON.—We will admit the qualifications of the doctor.

The WITNESS.—I knew Stewart Daly in his lifetime; on or about the 24th day of August, 1928, I received a call to go to St. James Hospital to attend him, and went there. I found a bone fractured, that means open to the air, of the left ankle, and a large laceration, about six inches long,—laceration means a cut, on the lower ankle, tearing the sole of the foot away from the bone; there was a smaller cut on the outside of the ankle; he was given ether and I cleansed the wounds in the usual manner, sutured them, and had him removed to Room 324; he remained in the hospital for four days. He came out of the anesthetic very nicely and seemed to be doing well the following day; the second day there was a good deal of swelling at and

(Testimony of Frank J. Williams.)

about the ankle and foot, and his condition generally was not so good; and the third day he had discoloration of the toes, and swelling quite a little above the ankle, and there was a peculiar symptom under the skin, showing that he had developed gas bacilli infection. I removed the stitches and applied chlorine solution, which was used a great deal during the war for this particular infection, but the infection continued to progress, the boy became very low; I decided the thing [28] to do was to amputate the leg in order to endeavor to stop the infection; I did an amputation of his leg, the upper third of the thigh, on the 28th of August; I found that the infection which caused the gas in the stitches, and which is usually fatal and very rapidly so, had extended up to the place where I amputated; the boy went into shock, that means that his condition was very bad or near collapse, during the operation, and we removed him to his room in the hospital, and he died a few hours afterwards. He died August 28th, 1928. The cause of death was infection by gas forming bacilli; the infection was caused by an injury to his left foot and ankle. During the time I treated him in the hospital and to his death he suffered a great deal of pain; it was a crushing injury caused by some object, by some weight falling on him, by some object with great momentum.

Cross-examination.

(By Mr. CLAXTON.)

The WITNESS.—The shock was caused by low

(Testimony of David Mottleson.)

vitality caused by the absorption of toxins or poisons of gas bacilli infection. The manipulation of the limb had something to do with it. He never recovered from the effects of that shock.

Witness excused. [29]

TESTIMONY OF DAVID MOTTLESON, FOR PLAINTIFF.

DAVID MOTTLESON, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

The WITNESS.—My name is David Mottleson; I reside in Butte, Montana; have lived here 25 years. My business in August, 1928, was buying junk. I was acquainted with Stewart Daly in his lifetime. I know the plaintiff, Freda Daly; I have known the family since 1921. I am acquainted with Swift & Company, their premises and place of business at 724 South Arizona Street in Butte, Montana. I was on those premises on or about the 20th day of August, 1928. I bought some machinery in this ice plant from Mr. Jones, representing the York Ice Machine Company. I paid $15.00 for it. I went to Swift & Company's plant to move it, take it out of there. It required dismantling before it could be removed. It was part of my agreement with the York Ice Machine Company

(Testimony of David Mottleson.)

that I should remove it from Swift & Company's plant; I bought it there in the basement. I know Mr. Young; I don't know whether he was superintendent or foreman, anyway he was the head man there, at Swift & Company. I did not have any conversation with Mr. Young relative to the removing of this old ice plant or the manner in which it was to be removed. Mr. Jones and I had the orders to take it out of there; Mr. Young was there when I had a conversation with Mr. Jones about taking out of this machinery, but he didn't say anything about taking it out. I had Oscar Hedman assisting me there in taking that machinery out, and this Stewart Daly, he brought the tools, whenever we needed any tools, he would help us around. He was in the basement all [30] the time. The ice machine plant was in the northeast part of the basement. I was to move this machinery the best way out which was through the elevator. There was no other way in which I could have removed it. There was a fly-wheel, which we took apart, it come apart in two pieces, and half of the fly-wheel weighed just about 1150 pounds. We moved this fly-wheel by running it out of there with chain blocks, turned it over on the flat side, pushed it toward the elevator; the floor was rather greasy, we couldn't get it on a skid because there wasn't space enough; we couldn't get it up to the elevator on a skid, so we moved it to the elevator, and landed it up in the elevator. Oscar Hedman assisted me in moving this half fly-wheel from the plant that we

(Testimony of David Mottleson.)

dismantled to the elevator. Stewart Daly was in and around the basement at that time; he handed us tools whenever we needed them. They said I could have the elevator whenever I needed it. By "they" I mean any of the men, Mr. Young and any of the men that were down in the basement, told me that I could have the elevator when it wasn't in use. They told me that a certain man there was to run the elevator for me, but at the time this man was in what they call the big box or big vat, where he was salting down or fixing up meat,—he had different clothes on, and as I had used the elevator the previous day, so I just went along and let the elevator down. I did that myself. No instructions were given me by Mr. Young as to how to use this elevator. I had used elevators before in different places. There was room for this elevator to drop beneath the level of the basement floor; there is a sump in every elevator; this one had about a foot or sixteen inches. The elevator wouldn't stop exactly on the floor; it would stop a little bit below. We had already moved a portion of this fly-wheel out [31] of there; we had moved part of the base and one-half of the fly-wheel and some of the bearings. This man that operated the elevator for us the day before released some band or pulled some back and lowered the elevator below the floor. I do not know whether the elevator could have been brought beneath the level of the floor unless there had been some change made or alteration made in the band; they worked some kind of belt or some-

(Testimony of David Mottleson.)

thing in back there where the cable was on to lower get the machinery on.

it. They did that at my request so that we could

As to the method in which we placed this half fly-wheel or intended to place it on the elevator, we had the fly-wheel on the face, the half fly-wheel on the face, and close to the elevator, and when I moved the elevator; I first let it down and then I moved the elevator up, and when it come up, it went up with such a jerk that I couldn't stop it; the part which touched this wheel, the wheel fell over on the side, and it was half of the wheel on a corner, right there, the corner, which hit the floor, the wheel hit the floor and kind of bounced up, because being kind of half circle, jumped up, and then when it come down again it hit the boy on the foot.

We could not get the wheel in the elevator by laying it flat on the floor. I did not suggest any other method of taking that wheel up by the use of the elevator to Mr. Young or any other foreman of Swift & Company; we decided that that would be the best way to get it out. I did not say anything to Mr. Young or any foreman of Swift & Company that I desired to raise the elevator up in the shaft and attach the fly-wheel to the bottom of the elevator and raise it that way. I talked that over with someone on the outside; I didn't talk that over [32] with any of the employees of Swift & Company.

(Testimony of David Mottleson.)

Stewart Daly was on the premises of Swift & Company from Monday until Friday, and we took out the balance on Friday afternoon after the accident. On Monday we were there half a day; we were there about 3½ hours on Monday, and every day after that, on Tuesday, Wednesday and Thursday we were there approximately 7½ hours a day.

Mr. Young, the manager of Swift & Company, was down in the basement while we were at work on two afternoons, just for a short period. Stewart Daly was there at the time. Mr. Young did not have any conversation with me during those times directly. I could not say whether or not this boy was around and within view of Mr. Young while he was there. He was there on the floor. There were men on that basement floor while Stewart Daly was there; I could not say whether they were foremen or not; they were workmen; I could not say they knew the boy was there; there was one particular man that was fixing up meats there, he and the boy were joshing each other. As to there being a foreman down there directing the work of the men, we were engaged taking this wheel apart, and we had to look to the wheel; we couldn't look all over the basement at the same time.

The basement was lit up; there are electric lights there. It was lit all the time we were down there.

Cross-examination.

(By Mr. CLAXTON.)

The WITNESS.—I think I bought the machinery

(Testimony of David Mottleson.)

on a Friday or Thursday preceding the Monday that I started to work. Stewart Daly worked for me a long time, but not in the basement; when I bought the machinery. He worked for me just during the school vacation, the summer vacation of that year. The [33] year previous he did a few errands for me, but he did not work steady. He had worked for me practically steady the summer that I moved the machinery from the Swift basement. I obtained permission from Mrs. Daly for his employment; his father knew he was helping me. I have known the family since 1921.

As to the conversation I had with Mr. Jones relative to this machinery, I first came down and looked over the place and told him that I would give him $15.00 for it, because there was quite a bit of work taking it out. They asked more money for it; they wouldn't let me have it for that; I mean by "they," Mr. Jones. My transactions so far as this machinery was concerned were entirely with Mr. Jones. I finally bought it from Mr. Jones for $15.00. My agreement was to take it out of there, as quick as I could, I guess.

Mr. Young told me that whenever I would want the elevator that I could have it, that is if it wasn't in use; if they were not using it, and there was one man, they told me that he would run the elevator for me. That was the man that was in the basement. I do not know his name. He operated the elevator a few times the day previous, and I did also. I never moved the elevator up with a load;

(Testimony of David Mottleson.)

I merely operated it in placing it on the floor. I saw this man when he operated it with the use of the belt; that was operating it by hand; I believe that was to lower it, I don't know why it was; I did not pay attention the way it was done, but I saw him do it. After he had fixed it under there then it would drop below the floor. I did not notice anything that connected up. On the morning of this accident I did not call this man to operate the elevator; he was in the vat room taking care of some meats, had slicker and hip boots on, and I had done it the day [34] previous, and so I just naturally undertook to do it myself. The elevator started with a jerk; that was not the normal way; it gave a sudden jerk. I pulled the cable; when I pulled the cable that hit the wheel more. I had had experience with elevators. I used to work for Zimmerman Furniture Store down here years ago, that belongs to Baxter now; they had an elevator in there; I worked in there for 13 months, and I worked in St. Paul for several concerns that had elevators of the same type. I had never operated the elevator in Swift's prior to this occasion. The operation of the elevator is handled by the cable, the way you handle the cable; if you throw it in immediately into full contact the full power is on.

Mr. Young told me not to operate the elevator but to call this man on the floor.

(Testimony of David Mottleson.)

Redirect Examination.

(By Mr. MAURY.)

The WITNESS.—The office was in the main floor of the building. When we went to work to get down into the basement we would have to pass the office. You would come into the door here and go this way; whether they would see you or not I couldn't say, but you would pass diagonally past the office. The three of us passed with our tools and working clothes on right by this office. When we would come out at noon we would come right by the same way. I did not notice whether Young was in there at those times. I first became acquainted with Young in the basement of Swift & Company's plant. Stewart was in the basement, but the basement is practically as large as this room. I think Young was there two afternoons that I and the boy were down there. Young wasn't there the day that the child was injured. [35]

Recross-examination.

(By Mr. CLAXTON.)

The WITNESS.—I do not know whether Mr. Young saw Stewart Daly in the basement.

Witness excused. [36]

TESTIMONY OF FREDA DALY, FOR PLAINTIFF.

FREDA DALY, the plaintiff, called as a witness, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

The WITNESS.—My name is Freda Daly; I am the plaintiff in this action. I am the mother of Stewart Daly; I can't recall when he was born, but he was 11 years, eight months and 23 days old when he died. I know David Mottleson; have known him quite a few years. That has been an intimate acquaintanceship between him and the family. I did not know at any time between the 20th and the 24th days of August, 1928, that my son, Stewart Daly was working on the premises of Swift & Company. I knew he was with Dave Mottleson, but I never thought he was in Swift's. I did not know it until the day he was up in the hospital. Before he was injured he was healthy and strong. I thought he was just around with Mottleson gathering up junk, you know, just to keep him out of mischief, thought he was safe, in good company, to take good care of him.

Cross-examination.

(By Mr. CLAXTON.)

The WITNESS.—I knew he was working for Mr. Mottleson; he had been working for Mr. Mottle-

(Testimony of Philip Daly.)
son for some little time. I also knew that Mr. Mottleson was engaged in the junk business.

Witness excused. [37]

TESTIMONY OF PHILIP DALY, FOR PLAINTIFF.

PHILIP DALY, called as a witness on behalf of the plaintiff, having been first duly sworn testified as follows:

Direct Examination.

(Br Mr. BROWN.)

The WITNESS.—My name is Phil Daly; Stewart Daly was my son. I know David Mottleson; have known him eight or ten years. I did not know at any time between the 20th of August, 1928, and the 24th day of August, 1928, that my son was working on the premises of Swift & Company. I knew he was working with Dave Mottleson, I didn't know where; that might be anywhere, Anaconda or Deer Lodge or Philipsburg, I couldn't tell; I couldn't know where he would be at; I knew he was along with him, Mottleson.

The WITNESS.—The boy was a big, husky boy prior to the 20th of August. The scale of wages for common laborers above the age of 21 years of age on the 20th and 24th days of August, 1928, was about $5.00 a day. The prevailing scale at this time I believe down town is $5.25, I am not sure.

(Testimony of Philip Daly.)

Cross-examination.

(By Mr. CLAXTON.)

The WITNESS.—It varies from time to time. I knew that my son was along with Mr. Mottleson, and that Mottleson was in the junk business. I did not know where Mottleson was working at that time; I did not inquire. My son had been working for Mottleson for some little time, during school vacation; he was always wanting to earn a dollar for himself so he would have some money in the bank; he had in the neighborhood I believe of ten dollars in the bank. I did not object to my son working for Mottleson; as long as he was a producer; I thought Mottleson was all right, and he used him all right; he would keep him out of mischief, as long as he was with Mottleson. [38]

Redirect Examination.

(By Mr. BROWN.)

The WITNESS.—Any money that was paid by Mottleson for the labor of my son was paid to the boy. I never received a cent.

Witness excused. [39]

TESTIMONY OF J. COPPO, FOR PLAINTIFF.

J. COPPO, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

The WITNESS.—My name is J. Coppo; I live

(Testimony of J. Coppo.)

at 431 South Idaho, in Butte; have lived here 37 years; I am a ropeman on the hill, have followed that occupation 6 years. The duties of a ropeman are to handle all heavy machinery; those are my duties, moving heavy weights; I am familiar with that class of work. In the course of my work I have moved a half of a fly-wheel of the weight of 1150 pounds. The safe and proper method of moving that kind of wheel is to have chains on boats, put it on a two-inch plank, put some rollers on it and roll it; lay it down flat, why a couple or three men on it, would be required; it all depends; of course if you stand it up on end, why have to have maybe two or three men to steady it, maybe have another man to pull it wherever it is going to. I heard the testimony of Mr. Mottleson as to the way that he moved this fly-wheel. With that method the number of men required would be one man on the side of the chain blocks, and one man pulling on the chain blocks; maybe two or three men to steady his fly-wheel; it would take three or four men anyway, not less than that.

Cross-examination.

(By Mr. CLAXTON.)

The WITNESS.—If the chain blocks were securely fastened about the wheel that would not of itself steady the wheel. We generally have three or four men to steady it; sometimes as high as five or six men. I work for the Anaconda Company; we don't do it with laborers. There are three of

(Testimony of J. Coppo.)

us; we don't [40] have laborers, we have skilled mechanics in that line. I would take into consideration the width of the fly-wheel in steadying it. I know just about the size of a fly-wheel; of course I don't know about this one at Swift & Company's. I know the size of the fly-wheels we handle. It is not a fact that if the fly-wheel were wider the less trouble it is to steady; you have to watch it all the time; the narrower the wheel the more dangerous.

Witness excused. [41]

TESTIMONY OF J. L. VISNER, FOR PLAINTIFF.

J. L. VISNER, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

The WITNESS.—My name is J. L. Visner; I live at 656 South Dakota, in Butte; have lived here over twenty years; I am a ropeman; have followed that occupation all my life. I am employed by the A. C. M. Company. We move heavy machinery, gallows frames and everything heavy, pipe. In the course of my occupation I have been called upon to move half of a metal iron wheel, fly-wheel, weighing approximately 1125 pounds, and weights of that character. In doing that kind of work it all depends how you move it, generally lift it up

(Testimony of David Mottleson.)
with tackle, or move it on the floor, lay it down on rollers first; lay it down on a boat and rollers.

(Recess.)

Witness excused. [42]

TESTIMONY OF DAVID MOTTLESON, FOR PLAINTIFF (RECALLED).

DAVID MOTTLESON, a witness heretofore called on behalf of plaintiff, recalled for further

Direct Examination.

(By Mr. MAURY.)

The WITNESS.—Stewart Daly was hurt by the fly-wheel hitting him in the foot; the elevator caused it to go over; in falling back after being struck by the elevator it crushed Stewart Daly's foot. It was just a little red; you couldn't see any blood. I took him immediately to the hospital where Dr. Williams treated him.

Cross-examination.

(By Mr. CLAXTON.)

The WITNESS.—The edge of the fly-wheel protruded over the elevator shaft; the rising of the elevator platform struck the edge of the fly-wheel and turned it over.

Another man and I were moving this fly-wheel; we brought it up in the elevator; it lay on its rounded edge; towards the center of it protruded over the elevator shaft; one of the ends protruded

(Testimony of David Mottleson.)

over the shaft. The elevator was below and I pulled something and made it come up; it struck that and lifted it up, fell back, and jumped up again. I could not say which side hit the floor, the right or left side; it hit on the side, tipped over towards the side, bounced up and hit and fell again.

Witness excused.

Mr. MAURY.—We rest.

Mr. McDANIEL.—May it please the Court, reserving the right to put on proof in case the motion is denied, we move the Court to grant a nonsuit in this matter and to dismiss the complaint, upon the grounds and for the reasons there is [43] no sufficient evidence to impose liability upon the part of Swift & Company.

First, The evidence shows that the boy was employed by Mottleson; the complaint alleges and the proof shows that Mottleson was an independent contractor.

Second, That Swift & Company is not required to oversee the servants of other employers; and the case has not been proven within Section 3095 of the Revised Codes of Montana, which says: Any person—"having control or management of employees, or having the power to hire or discharge employees, who shall knowingly employ or permit to be employed any child under the age of sixteen years, to render or perform any service or labor, whether under contract of employment or otherwise"—

Third, Swift & Company were not using the elevator in their business at the time of the accident; and also, the evidence shows that orders had been given that Swift & Company employees should not use the elevator whenever Mottleson wanted to use it; and the evidence shows,—the evidence of Mottleson, in moving the fly-wheel up, it projected into the elevator shaft.

Fourth, The complaint does not state facts sufficient to constitute a cause of action.

(Arguments.) [44]

The COURT.—Gentlemen of the Jury: As you know, before you went out the plaintiff had concluded its case *prima facie* and the defendant moved that the case be nonsuited; in other words, thrown out of court as no case at all; that the proof did not sustain any case in behalf of the plaintiff. The Court has come to the conclusion, as it now stands, the case is one that you ought to decide and the motion for a nonsuit is denied, and the defendant will proceed with its proof. Proceed for the defendant.

Mr. McDANIELS.—We ask an exception.

The COURT.—It will be noted. [45]

TESTIMONY OF T. J. McGINLEY, FOR DEFENDANT.

T. J. McGINLEY, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAXTON.)

The WITNESS.—My name is T. J. McGinley; I am bookkeeper and cashier of Swift & Company, and was such during the month of August, 1928. I recall the removal of the old ice plant from the basement of the plant. Mr. Mottleson removed it. Mr. Mottleson was not employed by anyone; the York Ice Machine Company had sold it. Swift & & Company did not have anything to do with the removal of that machinery from the plant.

I did not know Stewart Daly. I recall the young man who was injured upon the premises. Mr. Daly was not upon the pay-roll of Swift & Company. I am not familiar with the general operation of the elevator used in the plant; never operated it. As such bookkeeper requisitions for repairs would come through our office; I would be apprised of any requisitions for repairs of the elevator; I would execute such orders for repair with the approval of the manager. There were no repairs made to the elevator immediately following the accident.

Q. When were repairs made, if you know?

(Testimony of T. J. McGinley.)

Mr. MAURY.—We object; it was not out of condition, as they denied; there is no need of going into the question of repairs.

The COURT.—Sustained.

Cross-examination.

(By Mr. MAURY.)

The WITNESS.—The manager was W. G. Young at the time of the accident. I do not know, could not state definitely, how long Stewart Daly had worked in the basement there. I had seen [46] the boy just from the office; our office is apart from the other part of the building; and the only time I would see the boy would be when he would pass the office. I only saw him pass our office once; that was when we were moving one-half of that fly-wheel. As I understand it the first half was already removed when the boy was injured and they were working on the second half. I could not say definitely how many days it took to remove the first half of the fly-wheel, unless it was one day, one morning. At the time I saw them moving the first half of the fly-wheel the boy wasn't doing anything; when I saw him he was passing the office window. Evidently he went in and out with Mottleson, but I don't know that. I could not state whether he went down the elevator or walked down the stairs. I could not say exactly how many hours Mottleson worked there a day on the first half of the fly-wheel; and in fact we have no check at all for Mottleson's hours in the office; I did not go around

(Testimony of T. J. McGinley.)

and check the men that worked; I wasn't the timekeeper; the foreman on the floor was that; that is the man on the floor. Mr. McDonald was the foreman in the basement where this fly-wheel was being removed,—Reynolds J. McDonald. He was on shift in the basement from the 20th to the 24th of August, 1928; and on shift all day long. The shift was eight hours. He was in complete control of everything going on in the basement in regard to the manufacturing of meats. They did not dress meat in the basement; they didn't manufacture it, they smoked it; that is all the manufacturing, smoked meats. The shift goes to work and did on the 20, 21, 23 and 24 of August at seven o'clock in the morning, and worked until five o'clock in the afternoon. I believe McDonald was in the basement all that time those four [47] days.

I have a diagram of that basement. This is the diagram of the basement where the old ice machine was being removed from.

(Diagram received in evidence, marked Plaintiff's Exhibit 1.)

Q. Where was the ice machine when Mottleson and the boy and the other man that was here, started to move it?

A. I didn't notice the boy; I thought he was Mottleson's son. I did not know he was Stewart Daly. The old ice plant when they started to move it was right there, where I indicate, and is marked "York Compressor." That is where it was situated when they started to move it. I did not follow

(Testimony of T. J. McGinley.)

the course it took through the basement. The freight elevator was here, and it is marked "Elevator." This is the cooler or refrigerator for meats, indicated by the surrounding lines. They had to go around that to get to the elevator. There was no door in the basement that the old ice machine could have gone through. There was an opening, here is an opening here and there is another opening that doesn't show on this diagram; we have a regular shute. I do not know whether they all know it was going up the elevator; the manager knew it; we were the only ones that would know it unless they told the others. The manager did not release the elevator to Mottleson and tell the other employees that Mottleson could use it. As I understand it specific instructions were given as to the use of that elevator, as to who was to use it. Mr. Young, the manager, gave those instructions. I was not a direct witness to the conversation, but learned of it after the accident. [48]

Mr. Mottleson took the first half of the fly-wheel out of the building. I saw the first half of the fly-wheel go out; Mr. Mottleson was the gentleman I saw handling it; Oscar Hedman was with him, and I saw the boy around there; he was dressed in working clothes, and I thought he was Mottleson's son; I had only seen him once.

I have examined the pay-roll as to who was present during the 20th, 21st, 22d and 23d of August. Mr. Young was there. He was in charge and actually present on the premises on the 20th of August

(Testimony of T. J. McGinley.)

during working hours. I am not sure whether he was there all day on the 21st; he was in and out. I imagine he was in and out on the 22d, in routine business; he has an office, and attending to regular business in the office. I would say the first half of the fly-wheel passed by within ten feet of the door of his office. His office is enclosed in glass. You cannot see the entire building; you can see just a part of the front of the building. You could see the first half of the fly-wheel go out; I had to be in his office to see that.

Redirect Examination.

(By Mr. CLAXTON.)

The WITNESS.—I do not know whether Mr. Young saw that fly-wheel going out or not. Mr. Young is in and out of the plant during the day. Unless there is some business of some kind to be attended to he would not necessarily be in the basement.

Referring to this map I have marked the letter "A" on the map as the location of the new ice-machine. The new ice machine was installed before the old one was removed. The new ice machine was installed in a separate or different part of the [49] building than where the old one was situated. Mr. Young's office is a part of the general office. There is a partition between the office and the outside of the plant where the elevator operates. That partition is made of wood; I would say about four feet is wood, and then there is glass, or a window, about

(Testimony of W. G. Young.)
two feet and a half; for four feet from the floor the partition is wood.

Witness excused. [50]

TESTIMONY OF W. G. YOUNG, FOR DEFENDANT.

W. G. YOUNG, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAXTON.)

The WITNESS.—My name is W. G. Young; I am employed by Swift & Company, and was so doing the month of August, 1928, and in charge of the Butte Branch, manager of the Butte Branch plant. I know Dave Mottleson now, and recall the incident of removing of a certain ice generator or refrigerator. It was removed by Mr. Mottleson. Swift & Company had nothing to do with the removal of that plant. I recall the installation of the new machinery. I first met Mottleson when he came to see Mr. Jones. Mr. Jones was the erecting engineer for the York Ice Machine. I had nothing to do with the sale of the old ice plant. Mr. Jones was in charge of the sale of that plant. I first met or saw Mr. Mottleson when he came into the building and made arrangements with Mr. Jones to buy the old machine; I saw him come in the building. I did not participate in that conference. After he

(Testimony of W. G. Young.)

had a conference with Mr. Jones there was a conversation between Mr. Mottleson and me in regard to the use of the elevator in the Swift plant. Jones approached me and wanted to know if they could use the elevator to raise the machinery from the basement to the main floor, and I told Jones they could provided one of our men operated the elevator. Jones and I then went down in the basement and so instructed Mottleson, to which he agreed. I instructed employees of Swift & Company to operate the elevator for Mr. Mottleson; so instructed Mr. McDonald, who is the smokehouse man in the basement, and Mr. Richards, who is the foreman on the floor. I saw Stewart Daly upon the premises; I don't remember [51] whether that was the second or third day. I did not know that Stewart Daly was employed upon the premises by Mottleson. There was nothing said by Mottleson to indicate in what capacity Stewart Daly was upon the place.

Mr. McDonald is the smokehouse man, and he is located, with reference to his work, in the basement. At that time I was familiar with the operation of the elevator, and had operated it, but did not operate it during that particular week. I did not operate it immediately after the accident occurred, but saw it operated. There were no repairs made upon the elevator immediately after the accident. The elevator was in operating condition. The elevator has an automatic stop in the basement; and will stop automatically on its downward

(Testimony of W. G. Young.)

descent, and when it stops the platform is below the level of the floor. I don't know that I could state the reason why. The plan usually followed in bringing the elevator to the level of the basement floor is by handling a control cable, which is done by pulling up or down on the cable. You can also do it by releasing the weight that controls the cable. I was not present when the elevator was being used at Mr. Mottleson's request.

Cross-examination.

(By Mr. MAURY.)

The WITNESS.—There is no foreman in the basement. Mr. McDonald's duties were as a smoke-house man, which means that he washes and hangs the smoked hams and bacon; on August 20th he had one assistant in the daytime and a night man. I knew that the old ice plant was coming up the elevator. I did not see the first half of the fly-wheel as it went out through the building. On that day I was in the office part of the time and away from the office part of the time. [52]

I first saw Stewart Daly in the basement, which was not a place for customers, but a place for employees; that might have been two or three days before he was hurt.

Richards is the branch house foreman, over the men in the branch house; house foreman, we call him, and that includes the basement.

(Testimony of W. G. Young.)

Redirect Examination.

(By Mr. CLAXTON.)

The WITNESS.—My office is slightly to the front of the elevator shaft, and it is a separate part of the building; is an addition to the building. There is a solid wall on one side, and on the other glass and wood. The bottom half of the division, straight across the building is constructed of wood, for possibly four feet from the floor; the balance of it is constructed of glass for approximately four feet, and then wood for a foot or two.

Recross-examination.

(By Mr. MAURY.)

The WITNESS.—Richards the floorman or floor manager was there on the 20th of August and at work; he was also there on the 21st of August, 1928, and at work; also the 22d and at work, and 23d and at work.

Reredirect Examination.

(By Mr. CLAXTON.)

The WITNESS.—Stewart Daly was not employed by Swift & Company.

Witness excused. [53]

TESTIMONY OF REYNOLDS J. McDONALD, FOR DEFENDANT.

REYNOLDS J. McDONALD, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. McDANIEL.)

The WITNESS.—My name is Reynolds J. McDonald; I am employed by Swift & Company, and specifically my duties there are smokehouse man, smoking *hands* and bacon. I am in no way the superintendent of the basement part of that building.

I saw Stewart Daly around there, but didn't know him at that time; didn't know who he was at that time. I at no time ever gave Stewart Daly any orders, and never heard any man employed by Swift & Company ever give Stewart Daly any orders. I could not state what he was doing, because I didn't pay much attention to him; I thought he was around picking up bolts and the like of that.

I saw all of the machinery hauled up out of the basement. I had instructions from Mr. Young about the operation of that elevator. He said any time the elevator was to be moved that Mr. Mottleson was to get myself or one of the other boys to move it. Mottleson was present at that time and agreed to that. Mr. Mottleson thereafter had called upon me to operate the elevator a few times, but not

(Testimony of Reynolds J. McDonald.)

at that certain time. Nobody else to my knowledge operated the elevator for Mottleson.

To operate this elevator when you are in the basement, there is an endless cable to start and stop it; you pull down to raise it and pull up to lower it. I started the elevator in the basement when it was loaded, and Mr. Richards stopped it above; he would stop it the same way, with the cable.

I remember the last day the fly-wheel was removed, and was [54] in the basement the day before when the other half went up.

Q. Explain to the jury how the elevator comes down and automatically stops.

A. Well, on the cable there is a clamp that fits right around the cable, and then there is an eye-hook on the elevator that slides up and down the rope. You can set this clamp wherever you want the elevator to stop, and when the eye hits it, the clamp, it stops the elevator.

This clamp had been in the same condition as long as I know it.

When the elevator is coming down and automatically stops it goes below the floor of the basement maybe an inch and a half or two inches. The reason for that is that we have a railing on the elevator and a railing in the basement, and we put a bridge on that to run the pieces across, and we have to drop it below to even up the two railings with the bridge put across; that is, we have a railing running along the ceiling of the basement, and also a railing on the top of the elevator, so that in run-

(Testimony of Reynolds J. McDonald.)

ning meats from the smokehouse you can run it from this railing on to the elevator, and the elevator is so adjusted that this railing is on a level with the railing of the basement.

The day before the accident, in moving up the first half of the fly-wheel, I flushed the elevator level with the floor by releasing the brake and turning the fly-wheel by hand, the fly-wheel on the elevator. Mr. Mottleson present. In bringing it up that inch and a half or two inches I didn't use the motor of the elevator. It is hard to move the elevator that short distance with the motor, because the motor is so quick. [55]

While Mr. Mottleson was working there I believe I operated the elevator almost every load, only one or two, and then Mr. Richards operated the rest. I don't know how many loads were taken up. A person who is familiar with that elevator can use the cable and bring it up two inches and stop it level with the floor, but you have to know how to do it. The safest way to do it is to bring it up by the shaft or belt. The elevator was in good condition, and had been in the same condition for a length of time before the accident, and was in the same condition for a length of time after the accident. I did not notice any change in its operation. It was operated the same way after the accident as it was at the time of the accident and before the accident.

Stewart Daly was not allowed to ride on the elevator when there was a load on it. No person rode on the elevator when there was a load on it.

(Testimony of Reynolds J. McDonald.)

Cross-examination.

(By Mr. MAURY.)

The WITNESS.—Myself and Mr. Richards helped take the first half of the fly-wheel up. He is the same Mr. Richards that Mr. Young spoke of. He did not come down to the basement to take the first half of the fly-wheel up by the elevator. I stayed in the basement and he stayed on the first floor. I wasn't right there when they pushed the first half of the fly-wheel on the elevator, but I think they had rollers on it. There was Mr. Mottleson and another man working on it, and the boy was around there. The boy had overalls on. He was around there when the first half of the machine was put on the elevator. I couldn't say what he was [56] doing because I didn't pay any attention. I saw him around there every day that he was there, but couldn't say how many days it was. He may have been there from Monday until Friday. I didn't say I saw him picking up bolts and things, I said I thought that was what he was doing. I don't know what else he could be doing. The bolts and things he would pick up were put in a box and sent up the elevator; there was a box of bolts and other small stuff sent up by the elevator. I suppose they were the bolts that he picked up; I couldn't say that he picked them up.

(Testimony of Reynolds J. McDonald.)

Redirect Examination.

(By Mr. McDANIEL.)

The WITNESS.—I did not see Stewart Daly doing any work in the basement; just saw him around the machine; couldn't say what he was doing.

Witness excused. [57]

TESTIMONY OF F. R. JONES, FOR DEFENDANT.

F. R. JONES, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAXTON.)

The WITNESS.—My name is F. R. Jones; I am erecting engineer for the York Ice Company, and was employed by that concern during the month of August, 1928. I came to Butte about the 17th or 18th of August, 1928, if I recall. I supervised the installation of a new ice machine in the Swift plant. After the new installation was completed I sold the old machine to Mr. Mottleson. Mr. Mottleson came down to the basement of Swift & Company to see me and asked me what I wanted for the machine, and I told him $50.00; he said he thought that was too much, and he said he would give me fifty dollars if I moved it out of the basement. I told him I didn't want anything to do with moving it, that I wanted to sell it right where it

(Testimony of F. R. Jones.)

was setting; so after a few words of conversation why I accepted the $15.00 for the ice machine with the understanding that Mr. Mottleson should remove it from the basement. The old machine was removed from the basement by Mr. Mottleson and some other fellow who was working for him. I told Mr. Mottleson I would help him dismantle the machine, because he didn't understand how to take it apart. I was there when the machine was dismantled. I couldn't tell you the day I left Swift & Company's plant. At the time I left it was all moved, the machinery, except half the fly-wheel and a small part of the base. I left the Swift & Company one day before the accident, that is I was there up until a day previous to the accident; I left the morning of the accident, in fact; they told me the accident happened at 8:15 [58] and I caught the 8:10 train out of Butte. I was working the day previous at the Swift plant.

I recall a conversation between Mr. Mottleson and Mr. Young and myself with reference to the use of the elevator. I asked Mr. Young if I could use the elevator to take the machinery out, and he said we could. So we went to Mottleson and Young told Mottleson that the elevator was there to be used but for him not to use it; that Mr. Young's employees understood how to operate the elevator and whenever it was loaded why one man in the basement would start it and the man on the first floor would stop it.

(Testimony of F. R. Jones.)

I saw the elevator used the day previous to the accident. The elevator was stopped on the basement floor; it would naturally go to the basement; it couldn't go any further. When the elevator would be stopped by the automatic stop it would not stop level with the basement floor; it would stop a little lower than the floor, I would say approximately six inches. I observed the smokehouse man bring the elevator up to the floor level; I don't remember his name; he was on the stand just preceding me. The day previous to the accident I heard Mr. Mottleson request the Swift employees to operate the elevator for him. I observed Stewart Daly around the premises. He was just flunkeying around. I did not hear Mr. Mottleson make any reference to the boy as his boy; I thought the kid was Mottleson's son myself. I didn't know that he was employed by Mottleson. I didn't see him doing any part of the work of moving the machinery; I wouldn't say he did any of it; and didn't see him riding on the elevator. He probably passed by in front of the elevator, like the rest of us did, but he did not attempt to operate it to my knowledge. [59]

Cross-examination.

(By Mr. MAURY.)

The WITNESS.—When he passed by in front of the elevator he was walking. I don't know that he picked up bolts and small pieces of machinery.

I was in Swift & Company's for three weeks, in-

(Testimony of F. R. Jones.)

stalling the new machinery. They got rid of the old machinery because they installed a new one, and they didn't want the old one in the basement any more; it was in the way. I had no right to store the old machinery there any length of time; my contract was to get the old stuff out of there, but there was no time specified.

This conversation with Mr. Young about using the elevator was in the basement, at a time when Mr. Mottleson and Mr. Young were together, and then after Young had told Mottleson not to use the elevator, he went to his employees and told them to run it in case Mottleson asked him to when the elevator was loaded. There was no other party, no other man or boy there when that conversation took place. There was another man working there with Mr. Mottleson in the basement; but he wasn't there at that time. After this arrangement was made with Mr. Young I told Mr. Mottleson I would help him to dismantle it, and was helping him to dismantle it three days. I don't know where the boy Stewart Daly was all of that time. He was in the basement part of the time during working hours, but don't know how many hours a day. He was not there continuously with Mr. Mottleson. He had overalls on; I thought he was Mr. Mottleson's son. I don't know what Mr. Mottleson called the boy; I didn't call him anything.

(Testimony of Walter J. Richards.)

Redirect Examination.

(By Mr. CLAXTON.)

The WITNESS.—I had no occasion to say anything to the boy. York did not have anything to do with the removal of the old ice machine.

Witness excused. [60]

TESTIMONY OF WALTER J. RICHARDS, FOR DEFENDANT.

WALTER J. RICHARDS, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAXTON.)

The WITNESS.—My name is Walter J. Richards; I am foreman of Swift & Company, down at Swift & Company's plant on Arizona Street in the city of Butte, and have been employed at the Butte branch six years, and was so employed there during the month of August, 1928. I recall the removal of the old ice machine from the basement of the Swift plant. I heard Mr. Young give instructions to Mr. Mottleson as to the use of the elevator. Mr. Mottleson removed the old ice machine. Mr. Young told Mr. Mottleson any time he wanted to move the elevator to call one of his, Mr. Young's boys, on the floor, or the cellar man, to move the elevator. I recall the elevator being used the day previous to the occurrence of this accident for the removal of part

(Testimony of Walter J. Richards.)

of the ice machine. On this occasion Mr. McDonald started the elevator and I stopped it on the first floor. Mr. McDonald works for Swift & Company in the cellar, in the smokehouse department. In starting the elevator Mr. McDonald pulled the cable and I stopped it on the first floor, by pulling the cable. I never saw Mottleson operate the elevator at any time during the previous day, or at any time. I operated the elevator in the course of my work, and was operating the elevator at that time in the course of my work, and had operated it previously to the day of the occurrence of this accident, and operated it immediately following. The elevator was in a proper working condition. When the elevator is lowered to the basement it will stop automatically. When the automatic [61] stop is used the elevator does not stop level with the basement floor, but drops a little lower than the basement floor. The reason it drops lower is we hoist the smoked meats on trailers, and we have a little piece of rail put across to run the smoked meats onto the elevator, and it has got to drop a little lower in order to make a good connection for the rail. That is handled by an overhead track. There is a switch or connection between the overhead track in the basement and the track upon the upper part of the elevator; we have to put a six-inch bridge across there, and that is a joint. The elevator is so regulated that when it stops the track is level regardless of the floor. Sometimes I have had occasion to bring the elevator to the level of

(Testimony of Walter J. Richards.)

the floor. To bring it from the point where it stops automatically to level with the basement floor you just take the cable, and you have got to kind of give it a little short jerk, or if you have anything heavy you release the brake on the motor, and just raise it by hand. It requires experience to operate it by the cable.

I was at the plant on the morning of this accident but was not called upon to operate the elevator on that occasion for Mr. Mottleson. I was upon the floor at the time, and did not hear anyone ask or request to operate the elevator on that occasion.

I did not know Stewart Daly. I was under the impression he was Mr. Mottleson's boy, but did not hear Mr. Mottleson say anything which would indicate that, but formed my idea from the fact that he was around there. I don't know that he was employed by Mr. Mottleson.

Cross-examination.

(By Mr. BROWN.) [62]

The WITNESS.—I saw the boy picking up bolts and helping Mr. Mottleson around there, handing the men tools, wrenches, picking up bolts and bolt heads. When Mr. Mottleson started to dismantle the ice machine the boy was there, and was there all the time Mottleson was on the floor, until the boy was injured.

This elevator has been so fixed by Swift & Company that it stops automatically a few inches below the level of the floor down in the basement. You

(Testimony of Walter J. Richards.)

can bring the elevator up with the cable, or by leaving the brake off and raising it by hand. The hand method is the safest method to use if you have anything that you just want to raise it an inch or so; for a person who has not had any experience with it it is better to raise it by hand; it takes experience, anybody with experience and working there can raise it with the cable.

I never told Mr. Mottleson that in raising this elevator from below the floor level that he should use the hand operation rather than the rope operation. I did not hear Mr. Young or Mr. McDonald or any other man tell Mr. Mottleson that in raising the elevator up to the floor level he could raise it by the hand operation. Mr. Mottleson was not supposed to touch the elevator. He was not given any instruction.

Redirect Examination.

(By Mr. CLAXTON.)

The WITNESS.—I imagine the old ice machine from the point where it was dismantled to the elevator was about 30 or 35 feet. The work of dismantling was done at the location of the old plant, and none of that work was done at or near the elevator shaft.

Witness excused. [63]

TESTIMONY OF OSCAR HEDMAN, FOR DEFENDANT.

OSCAR HEDMAN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAXTON.)

The WITNESS.—My name is Oscar Hedman. I recall the removal of an ice machine from the basement of Swift & Company plant in this city, and assisted Mr. Mottleson in the removal of that machine. Mr. Dave Mottleson employed me. I was present in the basement when this accident occurred; at that time I was holding the fly-wheel, and Dave raised up the elevator, and as soon as he raised it up the fly-wheel fell over, which must have been caused from the elevator touching it; it was close to the elevator, the fly-wheel. The edge of the fly-wheel was protruding over the elevator shaft. I knew the little fellow that was injured, Stewart Daly. I don't know what he was doing; he was in behind, and I didn't see it at all, because I stayed by the fly-wheel where the elevator is, and when I come over he was lying about three or four feet ahead of the elevator there, and he was hollering, and so Dave carried him upstairs and took him to the hospital.

The old ice machine that we removed or took apart was further down; it was dismantled about

(Testimony of Oscar Hedman.)

ten or fifteen feet, I think, from the elevator shaft and to one side of the basement. I did not see the boys who were working for Swift operating the elevator the day before the accident.

Cross-examination.

(By Mr. BROWN.)

The WITNESS.—I got acquainted with the boy, Stewart Daly, the day before; he was helping Mr. Mottleson in taking this plant to pieces; he was picking up bolts like, and handing us [64] tools to work with. He wasn't around there all the time I and Mr. Mottleson were there, but was there some of the time. I live at 448 Ohio.

Witness excused. [65]

TESTIMONY OF DAVID MOTTLESON, FOR DEFENDANT.

DAVID MOTTLESON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. McDANIEL.)

The WITNESS.—I am the same Mr. Mottleson who was on the stand this morning. When Stewart Daly was hurt I took him to the hospital.

Q. Did you make any arrangements with the hospital for his care and treatment? A. Yes, sir.

(Testimony of David Mottleson.)

Mr. MAURY.—Objected to as not relevant or material in this case.

The COURT.—Sustained.

The WITNESS.—When I removed this fly-wheel up to the elevator it projected over into the elevator shaft about two inches. Mr. Hedman and myself did the moving.

Witness excused.

Mr. CLAXTON.—That is all.

The COURT.—Anything further for the plaintiff?

Mr. MAURY.—We rest.

The COURT.—Proceed with the arguments.

Mr. MAURY.—(At the end of the argument.) And now, having argued the measure of damages in this case, I submit that your Honor should instruct the jury peremptorily to find a verdict for the plaintiff in this case.

The COURT.—Now, Gentlemen of the Jury, having heard the evidence and the argument, it is now for the Court to instruct you in the law, and in the light of that law you will determine [66] the facts in the case. Remember this is what is termed a civil action. All those heretofore tried by you were criminal actions. The great distinction between criminal and civil actions is this: in criminal actions the plaintiff, the Government, cannot recover unless the guilt of the defendant is proven and the liability of the defendant proven beyond a reasonable doubt; but in a civil action the plaintiff can recover when he can prove his action

by the greater weight of evidence, that is a less degree of proof than beyond a reasonable doubt, as will instantly occur to you.

So in this case the plaintiff must prove her case by the greater weight of the evidence or the defendant will be entitled to a verdict. I am going to make it brief, because the case has take such a turn, that only brief, limited and plain instructions are necessary.

The case is brought under a statute, because while there is some negligence on the part of the defendant alleged in the complaint, apart from violation of the statute, the Court is free to say that none is proven other than violation of the statute. The statute provides—the statute of this State, Montana, provides that the employment of children under sixteen years in certain occupations is prohibited, and then it goes on to state what those occupations are and says, that any person, company or corporation, or any agent, officer or foreman having the control or management of employees, or having the power to hire or discharge employees, who shall knowingly employ or permit to be employed any child under the age of sixteen years, to render or perform any service or labor, whether under contract of employment or otherwise—that would be whether for pay or gratuituously—in or about any mine, mill, [67] smelter, factory—which is the important one here—workshop or factory, or in or about any passenger or freight elevator shall be guilty of a misdemeanor and punishable as in the statute provided. In other words, the

state would prosecute them for having violated this statute and they would be punished by certain penalties of fine or imprisonment; a person would be imprisoned, a corporation cannot be imprisoned, has no personality. The Court will tell you and state to you and instruct you that this case comes within that statute. This boy was apparently less than twelve years old, and he was employed in a workshop or factory, a place where fresh meats were converted into smoked and salt meats, apparently from the testimony before you, and apparently at the time he was killed he was employed to perform services in, on or about any freight elevator—he was about the freight elevator helping, you will remember, Mottleson to get rid of this fly-wheel and get it out of the premises.

There were charges that the elevator was defective. There is no proof that this elevator was defective; the elevator, so far as Swift & Company is concerned was in proper condition, reasonably safe to work. The real cause of the injury, after you take into account the fact that Swift & Company permitted the boy to be employed there, was negligence, disobedience of orders by Mottleson himself trying to run the elevator with which he had had no experience. But the law says that an employer who allows a boy to work there is guilty of negligence by that fact. He undertakes the duty, which the law imposes upon him, to see to it that to his knowledge no boy under that age is allowed to perform any service in, on or about his workshop or factory, or in, on or about his freight elevator. [68]

This law, of course, was established for a good purpose, which is to protect the young under sixteen who, as the saying is, are the seed corn for the next generation. Society is interested in perpetuating the race, of course; every member of society is, and to perpetuate the race in a healthy, strong, proper condition, and this is one way that society aims to reach it, by forbidding the employment of children in a place where they are likely to suffer in their health or in their limbs or in their morals. It goes on to say anyone who puts them in an immoral place, shall be equally guilty. So, Gentlemen of the Jury, it would seem from all of the evidence in this case that this boy, by the joint violation of duty on the part of Mottleson, who himself employed him, took him in that place, and who was primarily responsible and culpable in that the boy was injured by the elevator, and the defendant Swift & Company, who knew that he was being employed there, knew it through Richards,—Richards says he was the foreman,—which the law mentions, Richards says he had seen the boy there, picking up bolts, and helping Mottleson with tools and the like for several days. That is what the law says he knows, if the boy was employed there, then the superior, the corporation who employs that foreman is liable for whatever damages occurred, if that employment contributed to the injury to the boy, as apparently it has done in this case; if they had not allowed the boy to work there he never would have been injured by that elevator. So the Court will state to you, as requested by counsel for the plaintiff, the plain-

tiff, the administratrix for the deceased boy is entitled to recover.

Then the question will be for you, what damages ought to be awarded to compensate the boy, in the theory of law for the injuries that were inflicted upon him. He was about eleven [69] and three-quarters years old. The evidence is he was a husky boy, and apparently a boy that was helpful and willing to work, at least he was working on that occasion, with the consent of his father, no doubt, and apparently satisfactory to Mottleson.

He had a life expectancy, of which we take judicial notice of, oh, somewhere around 45 years. Life expectancy means that those who are interested in statistics of length of life, by taking persons in hundreds of thousands and averaging their life from childhood to old age, have discovered that the average person when born of this age, has a life expectancy of somewhere around 45 years. A person at birth has an average expectancy of around 57 years. Now, mind, we don't all live that long; some of us live longer; but that is how the average is arrived at. So this boy while he had an expectancy around 45 years,—the mortality tables are not in evidence, and I don't remember them offhand,—while he had an expectancy of 45 years he might not have lived that long; he might have died really before he ever reached 21, or might have lived much longer; but it is on what you consider the likelihood and reasonable probability that you finally base judgment in the case and the damage that the deceased's representative in this action now is entitled to recover,

or as to what would be a fair, reasonable compensation for the suffering that was imposed upon the boy by the injury that he received at that elevator during the time that he lived, some three or four days; he was injured on the 24th and the doctor says that he died on the 28th, living something like four days, and for that pain and suffering you are entitled and should make a reasonable compensation in money. Now of course there is no exact measure in money for the pain and suffering that the boy endured, and therefore it is left to the honest judgment of 12 men to [70] allow such reasonable amount as in their judgment is just.

In addition to that the representative of the deceased is entitled to recover whatever he would probably have earned after he arrived at the age of 21, if he arrived at that age. You see until he was 21 his father is entitled to his earnings, and this suit is not in behalf of his father or mother; it is in behalf of the boy himself, in the theory of the law, represented before you by the administratrix. So it will be for you to say what is reasonably probable of the boy having earned any particular amount of money, having lived to 21, how much longer it is reasonably likely he would live, and what would be his earnings during that period of time; counsel for the plaintiff has said, less what it would probably *would* have cost him to live. And of course when you come to estimate the amount of his earnings, you have to arrive at some opinion that he would live a certain length of time after 21, or some time; and that he would earn money; you would have to

consider whether he would work every day, what he would work at, what he would probably earn; there can be no exact standard, it is left to be measured by the sound judgment of 12 men; there is no other way to get at it. We cannot say what this boy would have done, whether he would have risen to some great height above common labor, whether he would have limited himself to common labor, or whether he would have turned out an idler. Of course the theory of the law is that he would have lived to his expectancy and that he would have worked and earned money, but it is for the jury to say how long they think he would have lived; what they think he would have earned, what they ought to allow as reasonable compensation for the loss of earnings which the [71] boy you may find would have earned. That is the only way it can be arrived at, the honest judgment of 12 men.

Well, that is all the case, Gentlemen of the Jury; leaves it only to determine the amount of money for pain and suffering and for the loss of earnings which the boy in your judgment might have received and secured during whatever time you believe he would have lived after he was 21 years of age.

When you retire to the jury-room select one of your number foreman and proceed to a verdict. It takes 12 to agree upon any verdict in this case. Any exceptions for the plaintiff?

Mr. MAURY.—No, sir.

The COURT.—Any for the defendant?

Thereupon the jury retired to consider of their verdict, and subsequently returned into court their

verdict in favor of the plaintiff and against the defendant, which said verdict is in words and figures as follows:

(Title of Court and Cause.)

VERDICT.

We, the jury in the above-entitled cause, do find our verdict in favor of the plaintiff above named, Freda Daly, as administratrix of the estate of Stewart Daly, deceased, and against the defendant above named, Swift & Company, a corporation, and do assess the plaintiff's damage in the sum of Five Thousand (5,000.00) Dollars.

M. A. FULMORE,
Foreman. [72]

BE IT FURTHER REMEMBERED, That thereafter and upon said 23d day of December, A. D. 1929, the Court duly made its order in said cause, and ordered the same entered upon the minutes of said court, as follows:

(Title of Court and Cause.)

"Thereupon, on motion of J. K. Claxton, Esq., the Court ordered that defendant be granted 20 days' additional for bill of exceptions herein."

And now, within the time allowed by law and as granted by the Court the defendant presents this its proposed bill of exceptions and asks that the same may be signed, settled and allowed as true and correct.

Dated this 8th day of January, A. D. 1930.

JOHN K. CLAXTON,
A. C. McDANIEL,
Attorneys for Defendant.

Service of the foregoing bill of exceptions, by acceptance of a true copy thereof is acknowledged on this 8th day of January, A. D. 1930.

R. LEWIS BROWN,
LOWNDES MAURY,
Attorneys for Plaintiff. [73]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

The undersigned, the Judge who tried the above-entitled cause, hereby certifies that the above and foregoing, by him corrected, is a full, true and correct bill of exceptions in said cause, and contains all evidence introduced, proceedings had and exceptions taken at the trial of said cause, and the same is accordingly signed, settled and allowed and ordered filed this 24th day of January, 1930.

BOURQUIN,
Judge.

Filed Jan. 24, 1930.

THEREAFTER, on March 7th, 1930, petition for appeal was duly filed herein in the words and figures following, to wit: [74]

[Title of Court and Cause.]

PETITION FOR APPEAL.

The defendant above named petitions this Court for an appeal herein, and respectfully shows:

1.

That this is an action for damages for death alleged to have resulted to *D*tewart Daly, deceased, on the 28th day of August, 1928, the injury being alleged to have occurred on the 24th day of August, 1928, at which time he is alleged to have been unlawfully permitted by the defendant to work upon its premises in Butte, Montana, and it being alleged that said death was due to the negligence of the defendant. The said action came regularly on for trial before the court sitting with a jury. After the introduction of evidence, the argument of counsel and the instructions of the Court, the jury returned its verdict in favor of the plaintiff and against the defendant, and judgment upon said verdict was entered in the said action on the 24th day of December, 1929, for the sum of five thousand dollars, together with plaintiff's costs.

2.

That the above-named defendant, Swift & Company, a corporation, feeling aggrieved by the said judgment and the proceedings had prior thereto in this action, desires to appeal from said judgment to the Circuit Court of Appeals, and the reasons

for its said appeal are set forth in its assignment of errors filed herewith, all of which errors were committed in said cause to the prejudice of the defendant.

Wherefore, the defendant prays that its appeal be allowed to the United *States Court* of Appeals, for the Ninth Circuit, for the correction [75] of said errors so complained of, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based and rendered duly authenticated, be sent to the said Circuit Court of Appeals under the rules of said court in such case made and provided.

Petitioner prays that such appeal shall operate as a stay of proceedings under said judgment on the defendant furnishing a bond in such amount as the Court may direct for such purpose according to law, and that said cause may be reviewed and determined and said judgment, and every part thereof, reversed, set aside and held for naught; and for such further relief or remedy in the premises as the Court may deem appropriate.

JOHN K. CLAXTON,
A. C. McDANIEL,
Attorneys for Defendant.

State of Montana,
County of Silver Bow,—ss.

A. C. McDaniel, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant named in the foregoing action,

and makes this verification for and on behalf of defendant for the reason that said defendant is a corporation and has no officer within the county where affiant resides; that he has read the foregoing petition, knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

A. C. McDANIEL.

Subscribed and sworn to before me February 18th, 1930.

[Notarial Seal] M. J. SHEEHAN,

Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires March 2d, 1931.

Service of the foregoing petition acknowledged and copy received February 19th, 1930.

LOWNDES MAURY,
R. LEWIS BROWN,
Attorneys for Plaintiff.

Filed March 7, 1930. [76]

THEREAFTER, on March 7th, 1930, order allowing appeal was duly filed herein in the words and figures following, to wit: [77]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

It is ordered that the appeal of the defendant in the above-entitled action from the judg-

ment heretofore made, given and entered therein, in favor of the plaintiff and against the defendant, be allowed as prayed in defendant's petition for appeal filed herein, upon the defendant executing a bond according to law in the sum of fifty-five hundred dollars, and that upon due execution, approval and filing of said bond the same shall act as a *supersedeas* herein.

Dated March 3, 1930.

FRANK S. DIETRICH,
Judge.

Filed March 7, 1930.

THEREAFTER, on March 7th, 1930, assignment of errors was duly filed herein in the words and figures following, to wit: [78]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

The defendant in the above-entitled cause makes and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above-entitled cause from the judgment therein entered on the 24th day of December, 1929:

1.

The Court erred in overruling the demurrer of the defendant to the complaint

2.

The complaint does not state facts sufficient to constitute a cause of action.

3.

The Court erred in denying the motion for a nonsuit.

4.

The evidence is insufficient to support the verdict, in that there is no evidence tending to show negligence in any of the particulars alleged in plaintiff's complaint.

5.

The Court erred in holding that there was any evidence that the negligence of the defendant, if shown, was the proximate cause of the death of the decedent, and in denying the defendant's motion for a nonsuit upon that ground.

6.

The Court erred in holding that section 3095, Revised Codes of Montana of 1921, was applicable to the facts of this case. [79]

7.

The Court erred in denying the motion for a nonsuit upon the ground that the evidence shows that the death of the decedent resulted from the negligence of his employer David Mottleson and not otherwise.

8.

The negligence of David Mottleson, the employer of Stewart Daly, is the efficient, proximate cause

of the injury to the decedent, not any negligence of the defendant—the negligence of Mottleson in operating the elevator and in placing the half portion of the fly-wheel where it could be struck by the elevator, and in employing decedent to work.

9.

The evidence fails to show that the decedent was employed by the defendant, but on the contrary shows that the decedent was employed by David Mottleson, an independent contractor, to do the work of Mottleson.

10.

The evidence shows that David Mottleson is the one guilty of negligence *per se,* in that, he is the one who employed the decedent to work, that he is the one who violated the statute, section 3095, R. C., and he is the prime or first mover in a course of events which led to the injury and death of the decedent.

11.

The evidence shows negligence on the part of the decedent in putting himself in a position where he could be injured, he not assisting in moving the fly-wheel, which negligence is not explained away by the plaintiff.

12.

The evidence fails to show any notice or knowledge on the part of the defendant that the decedent was working on the premises of the defendant.

13.

The Court erred in denying the motion for a non-

suit upon the ground that the defendant, under section 3095, R. C., was guilty of negligence *per se* in allowing the decedent to be upon its premises though employed by another, an independent contractor. [80]

14.

The Court erred in denying the petition for a new trial.

WHEREFORE, the defendant prays that said judgment be reversed and said action be finally dismissed.

JOHN K. CLAXTON,
A. C. McDANIEL,
Attorneys for Defendant.

Service of the foregoing assignment of errors acknowledged and copy received February 19, 1930.

LOWNDES MAURY,
R. LEWIS BROWN,
Attorneys for Plaintiff.

Filed Mar. 7, 1930.

THEREAFTER, on March 7th, 1930, bond on appeal was filed herein in the words and figures following, to wit: [81]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Swift & Company, a corporation, the defendant above named, as principal, and the National Surety Company, a corporation organized

and existing under and by virtue of the laws of the state of New York, and qualified and authorized to execute bonds and undertakings and to act as surety generally within the state and district of Montana, as surety, are held and firmly bound unto Freda Daly, as administratrix of the estate of Stewart Daly, deceased, the plaintiff above named, in the full sum of fifty-five hundred ($5500.00) dollars, to be paid to the said plaintiff, her executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with out seals and dated this 7 day of February, 1930.

Whereas, in the District Court of the United States in and for the District of Montana, in the above-entitled suit pending in said court between Freda Daly, as administratrix of the estate of Stewart Daly, deceased, plaintiff, and Swift & Company, a corporation, defendant, a judgment was rendered against the said defendant, which judgment was entered on the 24th day of December, 1929, and the said defendant has petitioned for an appeal from said judgment to the Circuit Court of Appeals of the United States, for the Ninth Circuit, and an order has been prayed allowing said appeal, and said defendant proposes to prosecute said appeal to reverse the said judgment, and desires that execution [82] be stayed pending the determination of said appeal,—

Now, therefore, in consideration of said appeal and said supersedeas the condition of this obligation is such that if the above-named Swift & Company, a corporation, the said defendant, shall prosecute its said appeal to effect and answer all damages and costs, if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

SWIFT & COMPANY.
By W. W. SHERMAN,
Assistant Treasurer.

[Corporate Seal] Attest: J. E. CORBY,
Assistant Secretary,
Principal.

NATIONAL SURETY COMPANY.
[Corporate Seal]
By ALBERT L. STARRS,
Attorney-in-fact,
Surety.

Countersigned at Helena, Montana.
H. L. HART,
Resident Vice-president.

The foregoing bond approved this 3d day of March, 1930.

FRANK S. DIETRICH,
Judge.

It is agreed that the within bond is sufficient in form and amount.

LOWNDES MAURY,
R. LEWIS BROWN,
Attorneys for Plaintiff.

State of Illinois,
County of Cook,—ss.

I, Warren H. Burns, a notary public of Cook County, in the State of Illinois, do hereby certify that Albert L. Starrs, Attorney-in-fact, of National Surety Company, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered said instrument, for and on behalf of National Surety Company for the uses and purposes therein set forth.

Given under my hand and notarial seal at my office in the city of Chicago, in said County, this 7th day of February, A. D. 1930.

[Notarial Seal] WARREN H. BURNS,
Notary Public. [83]

State of Illinois,
County of Cook,—ss.

Before me, a notary public in and for said County and State, personally appeared W. W. Sherman and J. E. Corby, Assistant Treasurer and Assistant Secretary respectively, of Swift and Company, and acknowledged that they executed the within instrument for the uses and purposes therein set forth.

Witness my hand and notarial seal this 7 day of February, A. D. 1930.

[Notarial Seal] F. O. CLARK,
Notary Public.

Commission expires June 1, 1931.

KNOW ALL MEN BY THESE PRESENTS, That the National Surety Company, a New York corporation, having its principal office in the City, County and State of New York, doth hereby make, constitute and appoint Albert L. Starrs, of Chicago, of the State of Illinois, its true and lawful attorney-in-fact, with full power and authority to sign, execute, acknowedge and deliver in its name, place and stead, as surety, bonds, undertakings and writings, obligatory in the nature thereof, and when said bonds, undertakings and writings obligatory are signed by the said Albert L. Starrs as such attorney-in-fact, to bind the Company as fully and to the same extent as if the same were signed by the President of the Company, sealed with its common seal, and duly attested by its Secretary; and the said Company hereby ratifies and confirms all the acts of the said attorney-in-fact done pursuant to the power and authority herein given.

This Power of Attorney, is made and executed in accordance with and by authority of the following by-law adopted by the Board of Directors of the National Surety Company at a meeting duly called and held on the third day of October, 1922, which reads as follows:

ARTICLE XII.—Resident Officers and Attorney-in-Fact.

SECTION 1.—The Chairman, Vive-Chairman, President or any Vice-President may from time to time, appoint Resident Vice-President, Resident

[84] Assistant Secretaries and Attorneys-in-Fact to represent said act for, and on behalf of the Company, and either the Chairman, Vice-Chairman, President or any other Vice-President, the Board of Directors, or the Executive Committee may at any time remove any such Resident Vice-President, Resident Assistant Secretary or Attorney-in-Fact and revoke the power and authority given them.

SECTION 4.—ATTORNEYS-IN-FACT. — Attorneys-in-Fact may be given full power and authority to execute for and in the name, and on behalf of, the Company, and *and* all bonds, recognization, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizances or conditional undertakings, and any such instrument executed by any such Attorney-in-Fact shall be as binding upon this Company as if signed by the Chairman, Vice-Chairman or President and sealed and attested by the Secretary.

SECTION 6.—ATTORNEYS-IN-FACT. — Attorneys-in-fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances or contracts of indemnity, policies of insurance, and are also authorized and empowered to certify to a copy of any By-Law contained in Articles VI, and XIII of the By-Laws of the Company.

IN WITNESS WHEREOF, the National Surety Company has caused these presents to be signed by its Vice-President and its corporate seal to be hereto

affixed, duly attested by its Assistant Secretary, this 22d day of December, A. D. 1926.

NATIONAL SURETY COMPANY,
By J. L. MEE,
Vice-president.
Attest: E. A. COLLINS,
Assistant Secretary.

State of New York,
County of New York,—ss.

On this 22d day of December, A. D. 1926, before me personally came J. L. Mee, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Vice-President of the National Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; [85] that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[Notarial Seal] M. M. MILLER,
Notary Public.

State of New York,
County of New York,—ss.

I, B. R. Hoogland, Assistant Secretary of the National Surety Company, do hereby certify that the above and foregoing is a true and correct copy of a power attorney, executed by said National Surety Company, which is still in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Company, at the City of New York, this 7th day of February, A. D. 1930.

[Corporate Seal] B. R. HOOGLAND,
Assistant Secretary.

THEREAFTER, on March 7th, 1930, citation on appeal was duly filed herein in the words and figures following, to wit: [86]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States of America, to Freda Daly, as Administratrix of the Estate of Stewart Daly, Deceased, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal filed in the Clerk's office of the United States District Court for the District of Montana, wherein Swift and Company, a corporation organized and existing under and by virtue of the laws of the State of West Virginia, is appellant, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy

justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK S. DIETRICH, United States Circuit Judge for the Ninth Circuit, this 3d day of March, 1930.

FRANK S. DIETRICH,
U. S. Circuit Judge.

Service of the within and foregoing citation on appeal admitted and copy received this 7th day of March, 1930.

LOWNDES MAURY,
R. LEWIS BROWN,
Attorneys for Appellee. [87]

[Endorsed]: Filed Mar. 7, 1930. [88]

THEREAFTER, on March 7th, 1930, praecipe for transcript on appeal was duly filed herein in the words and figures following, to wit: [89]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

To C. R. Garlow, Clerk of the Above-entitled Court:

Please prepare a transcript of the record for the purpose of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment entered in the above-entitled cause on the 24th day of December, 1929, in favor of the plaintiff and against the defendant, and include therein the following:

The complaint of plaintiff.

The demurrer to complaint.

The entry of May 14, 1929, showing overruling of demurrer.

The answer of defendant.

The reply of the plaintiff.

The minute entry showing cause on trial.

The verdict.

The judgment.

The bill of exceptions as settled, allowed and filed.

The petition for a new trial.

The order denying new trial.

The defendant's petition for appeal.

The order allowing appeal.

The assignment of errors.

The bond on appeal.

Citation.

This praecipe.

JOHN K. CLAXTON,
A. C. McDANIEL,
Attorneys for Defendant.

Service of the foregoing praecipe acknowledged and copy received February 19, 1930.

LOWNDES MAURY,
R. LEWIS BROWN,
Attorneys for Plaintiff. [90]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 91 pages, numbered consecutively from 1 to 91, inclusive, is a true and correct transcript of the record and proceedings had in the within entitled cause and the whole thereof required, by praecipe filed, to be incorporated in said transcript, as appears from the original records and files of said court and cause in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation issued in said cause.

I further certify that the costs of said transcript amount to the sum of Twelve and 25/100 Dollars ($12.25), and have been paid by the appellants.

WITNESS my hand and the seal of said court at Butte, Montana, this 26th day of March, A. D. 1930.

[Seal]

C. R. GARLOW,
Clerk as Aforesaid.
By L. R. Polglase,
Deputy. [91]

[Endorsed]: No. 6112. United States Circuit Court of Appeals for the Ninth Circuit. Swift and Company, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of West Virginia, Appellant, vs. Freda Daly, as Administratrix of the Estate of Stewart Daly, Deceased, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed March 28, 1930.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6112

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SWIFT AND COMPANY (a corporation organized and existing under and by virtue of the laws of the State of West Virginia),
Appellant,

vs.

FREDA DALY, as administratrix of the estate of Stewart Daly, deceased,
Appellee.

BRIEF FOR APPELLANT.

JOHN K. CLAXTON,
A. C. McDANIEL,
Butte, Montana,
Attorneys for Appellant.

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No. 6112

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SWIFT AND COMPANY (a corporation organized and existing under and by virtue of the laws of the State of West Virginia),
Appellant,

vs.

FREDA DALY, as administratrix of the estate of Stewart Daly, deceased,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This action was brought by the administratrix of the estate of Stewart Daly, deceased, to recover for his death. The complaint (R. 2) alleges in substance: On August 1, 1928, the defendant contracted with the York Ice Machine Company for a new ice machine and for the removal of an old ice machine from the packing plant of the defendant. The York Ice Machine Company in turn sold the old ice machine to David Mottleson, who agreed to remove it. The only way the old machine could be removed was by a freight elevator. Though the York Ice Machine Company and David Mottleson were independent contractors, yet in the removal of the old ice machine

they were furthering solely the designs and desires of the defendant. The elevator was one of unusual design and due care required that one experienced in operating it should operate it when in use. The elevator started with a jump and jerk, and could not be brought to a stop unless the rope were pulled far enough. The defendant negligently failed to warn Mottleson and negligently failed to put any trained man in control while the old ice machine was being removed. The work of removing the old ice machine was inherently and intrinsically dangerous, even if extraordinary care were used, it being the duty of the defendant to use due care for the safety of all invitees into its premises. On August 20th Stewart Daly, without the knowledge of his parents or of the work, was employed as a casual servant of David Mottleson helping remove the old ice machine up the elevator.

Paragraph IX (R. 7) of the complaint alleges: "That continuously eight hours each day or thereabouts from Monday, the 20th day of August, 1928, until Friday, the 24th day of August, 1928, Swift & Company, being engaged in business in Montana, knowingly and negligently and wrongfully and unlawfully permitted to be employed and to render and perform services and labor in, on, and about a certain freight elevator in its plant at 724 South Arizona Street in Butte, Silver Bow County, Montana, Stewart Daly, a child under the age of 16 years, to-wit, of the age of 11 years 8 months and 22 days, and the said elevator being in operation constantly during such time, and such employment and service and labor of the said child, Stewart Daly, being at all times, until

after he was injured, unknown to Philip Daly the father of the said child and unknown to the mother this administratrix, and such conduct of Swift & Company was a proximate and efficient and direct cause of the injury to Stewart Daly, hereinafter set out, and the elevator in motion overturned on Stewart Daly the half fly-wheel and so injured him that he died after lingering about three days."

On August 24, 1928, in the course of the work the half fly-wheel weighing about 1350 pounds was being loaded on the elevator, and was resting ends up on its circumference projecting over the elevator shaft. Stewart Daly was helping steady the fly-wheel, and while Mottleson, unskilled in the operation of the elevator, was attempting to bring the elevator to the level of the floor, the elevator started with a jerk from some distance below the floor and struck the fly-wheel which was projecting into the shaft and turned it over on the foot of Stewart Daly and crushed the same. Stewart Daly received reasonable and skillful surgical attention, but due to such injury infection set in and he died three days later.

The defendant demurred (R. 11) general and special, to the complaint, which demurrer was overruled. The defendant answered (R. 14) admitting and denying the allegations of the complaint, and alleged affirmatively: That Stewart Daly was employed by Mottleson and took orders from Mottleson only, and worked under and with Mottleson, and they were engaged in the same work, that of removing the old ice machine, which was owned by Mottleson; that in the course of their work they placed a portion of

the fly-wheel so that it projected into the elevator shaft, so that it could be struck by the elevator, and that Mottleson without authority of the defendant operated the elevator so that it did strike the fly-wheel and overturn it upon Stewart Daly. The plaintiff replied to the answer (R. 17), admitting nearly all of the affirmative defense.

The plaintiff abandoned all allegations of negligence except that alleged in paragraph IX, which is based upon section 3095 of the Montana Codes of 1921, and the evidence relates solely to those allegations. We will try to briefly summarize the evidence of the plaintiff on this point.

David Mottleson (R. 30) shows in substance the following: He purchased the old ice machine from the York Ice Machine Company for $15.00 and agreed to remove it from the basement of the defendant's plant, where he bought it. He had no conversation with the manager of the defendant relative to the removal of the ice machine. He had Oscar Hedman and the boy Stewart Daly helping him, Daly carrying tools. The fly-wheel was moved to the elevator. He was told he could use the elevator when the defendant was not using it, and that there was a man in the basement to run the elevator for him. He had no instruction how the elevator could be used. The fly-wheel was close to the elevator. He first moved the elevator down, and then up, and when it came up it went up with a jerk and touched the fly-wheel which fell on the boy. The manager of the defendant was in the basement, but witness did not have any conversation with the manager at such times. The em-

ployee of the defendant operated the elevator a few times on the day previous to the accident, as did the witness, but witness never moved the elevator with a load on it. On the morning of the accident, the witness did not call the employee of the defendant to operate the elevator, though the man was in the basement. The manager of the defendant had told the witness not to operate the elevator but to call the man on the floor. Does not know whether the manager of the defendant saw the boy. The parents of the boy knew the boy was working for witness.

The plaintiff here introduced expert testimony on the moving of heavy machinery. David Mottleson being recalled (R. 43) testified: "The edge of the fly-wheel protruded over the elevator shaft; the rising of the elevator platform struck the edge of the fly-wheel and turned it over. Another man and I were moving this fly-wheel; we brought it up in the elevator; it lay on its rounded edge; towards the center it protruded over the elevator shaft; one of the ends protruded over the shaft. The elevator was below and I pulled something and made it come up; it struck that and lifted it up, fell back and jumped up again."

At the close of plaintiff's case, the defendant moved for a nonsuit (R. 44) on the grounds: The evidence shows the boy was employed by Mottleson, and that Mottleson was an independent contractor; that the defendant was not required to oversee the servants of other employers; that a case has not been proven within section 3095 of the Revised Codes of Montana; that the defendant was not using the elevator at the time of the accident; that Mottleson in moving the

fly-wheel up, projected it into the shaft. The motion was denied.

The defendant, by the witness R. J. McDonald (R. 55) showed: He was present when Mottleson was told to get a Swift Company employee to run the elevator, and Mottleson thereafter called on one of the Swift men to operate the elevator. "The day before the accident, in moving up the first half of the fly-wheel, I flushed the elevator level with the floor by releasing the brake and turning the fly-wheel by hand, the fly-wheel on the elevator. Mr. Mottleson was present. In bringing it up that inch and a half or two inches I didn't use the motor of the elevator. It is hard to move the elevator that short distance with the motor, because the motor is so quick" (R. 57).

F. R. Jones, for defendant (R. 59). Came to Butte to install the new ice machine. After the new installation was completed, he sold the old ice machine to Mottleson who agreed to move it from the basement. The manager of the defendant told Mottleson that the defendant's servants would operate the elevator. Heard Mottleson request Swift employees to operate elevator for him. The witness left Butte the day before the accident. He had a contract with Swift to get the old machinery out. After the manager told Mottleson not to use the elevator, he went to his employees and told them to run it in case Mottleson asked.

W. J. Richards, for defendant (R. 63). Mr. Young, the manager of Swift, told Mottleson when he wanted to move the elevator to call one of the Swift boys.

Operated the elevator previous to the accident and immediately after, and it was in proper working condition. Had operated the elevator for Mottleson, but was not called on to operate it at the time of the accident.

Oscar Hedman, for defendant (R. 67). Dave Mottleson employed him. Was present when accident occurred; was at that time holding the fly-wheel. When Mottleson raised the elevator, the fly-wheel fell over. The edge of the fly-wheel was protruding over the elevator shaft.

The appeal is from the judgment. The questions raised are: 1. Does section 3095, Revised Codes of Montana of 1921, apply to this case? Before that section can apply to any case, does not the injured minor have to be in the service of the defendant in its plant and at one of the prohibited employments? 2. What is the proximate cause of the accident? Is is not the proximate cause the violation of section 3095 by Mottleson and Mottleson's negligent operation of the elevator and negligent placing of the fly-wheel where it could be struck? 3. The sufficiency of the evidence. 4. Was not Stewart Daly guilty of contributory negligence? 5. Parties in pari delicto.

SPECIFICATION OF ERRORS.

1.

The court erred in overruling the demurrer to the complaint (R. 13).

2.

The court erred in denying the motion for a nonsuit (R. 44).

3.

The court erred in holding that section 3095, Revised Codes of Montana of 1921, was applicable to the facts of this case.

4.

The court erred in holding that there was any evidence that the negligence of the defendant, if shown, was the proximate cause of the death of the decedent.

5.

Th negligence of David Mottleson, the employer of Stewart Daly, is the efficient, proximate cause of the injury to the decedent, not any negligence of the defendant—the negligence of Mottleson in operating the elevator and in placing the half portion of the flywheel where it could be struck by the elevator, and in employing the boy to work.

6.

The evidence shows that David Mottleson is the one guilty of negligence per se, in that he is the one who employed the boy to work, that he is the one who violated section 3095, R. C.

7.

The court erred in holding that the defendant, under section 3095, R. C., was guilty of negligence per se, in allowing the boy to be upon its premises though employed by another, an independent contractor.

8.

The evidence shows negligence on the part of the boy in putting himself in a position where he could be injured, he not assisting in moving the fly-wheel, which negligence is not explained away by the plaintiff.

9.

The evidence fails to show any notice or knowledge on the part of the defendant that the boy was working on the premises of the defendant.

10.

The court erred in denying the petition for a new trial (R. 24).

ARGUMENT.

The appellant feels that this appeal can be more clearly presented by discussing the specification of errors under the heads of the questions raised (set forth just preceding the specifications), the sufficiency of the evidence of necessity mingling with the other points.

1.

DOES THE COMPLAINT STATE A CAUSE OF ACTION UNDER SECTION 3095, REVISED CODES OF MONTANA OF 1921? DOES THIS SECTION APPLY TO THIS CASE? IS THE EVIDENCE SUFFICIENT TO SUSTAIN THE VERDICT AND JUDGMENT UNDER THIS SECTION? SHOULD NOT THE MOTION FOR A NONSUIT HAVE BEEN GRANTED? HAS NOT THE COURT IN ITS RULINGS MISCONSTRUED THIS SECTION?

Section 3095 is:

> Any person, company, firm, association, or corporation engaged in business in this state, or any agent, officer, foreman, or other employee having control or management of employees, or having the power to hire or discharge employees, who shall knowingly employ or permit to be employed any child under the age of sixteen years, to render or perform any service or labor, whether under contract of employment or otherwise, in, on, or about any mine, mill, smelter, workshop, factory, steam, electric, hydraulic, or compressed-air railroad, or passenger or freight elevator, or where any machinery is operated, or for any telegraph, telephone, or messenger company, or in any occupation not herein enumerated which is known to be dangerous or unhealthful, or which may be in any way detrimental to the morals of said child, shall be guilty of a misdemeanor and punishable as hereinafter provided.

The only Montana case dealing with this section is the case of *Burk v. Montana Power Company,* 79 Mont. 52, 255 Pac. 337, which does not reach the matter here. That case only deciding that the words "or in any occupation not herein enumerated which is known to be dangerous or unhealthful, or which may

be in any manner detrimental to the morals of said child" are void.

The trial court placed too broad a construction on section 3095. First: The court did not limit the meaning of the section to the proposition that the minor must be in the employ of the defendant Swift. Second: The defendant has and had no control over the servants of Mottleson, no power to hire or discharge them, no right to control them. Third: "Permit to be employed" means employed by Swift, or in the service of Swift. Fourth: "In, on or about * * * freight elevator" means employed "in or on," as an elevator boy; "about," as doing work directly connected with the elevator, such as repairs, and not merely riding upon or using it, when operated by another, as a means for doing his work. Fifth: Knowledge by Swift of the employment is necessary.

The phrase "having control or management of employees, or having the power to hire or discharge employees" applies to "any person, company," etc., as well as to "any agent, officer," etc. That is, the company must have the right to hire and discharge, or the company's officer must have that right, before the case falls within the statute. The sense of the section is that the minor must be in the employment of the company which owns or runs the factory, mill, smelter or elevator, and not there casually as the servant of and in the employment of a third person. If this is not true, then a railroad must oversee all persons who go to its freight depot to haul away freight; every boy on delivery wagons or transfer wagons of grocery houses, which employment is not banned by the stat-

ute, must be questioned before he can take an article from the railroad. The result of this is that one man must be and is the guardian and overseer of another man's servants.

The minor must be directly in the employment of the factory before the statute can apply, and not in the employment of an independent contractor of a third person who has business or work at the factory. The only case we have been able to find directly on this point is that of *Rugart v. Keebler-Weyl Baking Co.*, 121 Atl. 198; 277 Penn. 408, where it is said:

> The act of 1905 (P. L. 352) is inapplicable to the facts of this case. It is an act to regulate employment by regulating the age at which minors may be employed, and the safety and health of employees. The purpose is to safeguard employees in the factories or buildings of their employers; it does not extend to the premises of others where those who might engage the employer to work. Such persons do not incur liability under the act as employers of minors, where the employer brings onto the premises a minor unlawfully employed, who may later be injured. To subject to liability within the terms of the act, the relation of master and servant must exist, or a situation tantamount thereto; otherwise the common-law rules applicable to torts govern injuries of this character.
>
> This defendant owed no statutory duty to the boy plaintiff to guard its shafting, to instruct him as to the dangers incident to his work, or to offer him a reasonably safe place in which to work. These were obligations of the employer, whose duty it was to provide a safe place and to instruct

> the employee in the dangers incident to his work, as well as to observe the statutory duty of employment.

It is also said in the case of *Brilliant Coal Co. v. Sparks,* 81 So. 185; 16 Ala. App. 665:

> The complaint in the instant case fails to specifically allege that the defendant retained supervision and control of the mine to such an extent that it could have prevented the employment of plaintiff. If this were so the defendant could not be held liable for the injury.

Some meaning must be given to the phrase "having control or management of employees, or having the power to hire or discharge employees." And that meaning can only be that the minor must be the servant of the factory owner. In this case the complaint fails to allege facts, and the evidence fails in facts, showing that the defendant had control or management of Stewart Daly, or had the power to hire or discharge him. The evidence shows the directly opposite facts.

The cases which are relied upon by the plaintiff all show that the injured minor was more or less in the employment of the factory owner.

Section 3095 also provides "who shall knowingly employ or permit to be employed," and in this respect differs from the statutes of some states. Knowingly here means that the factory owner must have knowledge of the unlawful employment of a minor. In the case of a corporation, such knowledge must be brought home to the managing head, or to a person or board

who or which has the authority and power to correct the employment. The evidence does not show that the defendant or any of its managers or officers or responsible head knew Stewart Daly was employed by Mottleson to work at the plant (and Daly was so employed because it is admitted by the plaintiff). Knowledge of wrongful employment coming to a day laborer or to one who has no directing power is not knowledge of the corporation. The fact that Daly was there and was seen by certain servants of the defendant picking up bolts and carrying tools does not show knowledge in the defendant of employment.

People v. Taylor, 85 N. E. 759; 192 N. Y. 398;
Clover Creamery Co. v. Kanode, 129 S. E. 222; 142 Va. 542.

2.

PROXIMATE CAUSE.

Suppose that Stewart Daly was, contrary to the statute, allowed by the defendant to work at its plant. Then, is such act of the defendant the proximate cause of the injury? Is not the proximate, inducing cause the wrongful employment of the boy by Mottleson, and the negligent operation of the elevator by Mottleson (a person not connected with the defendant), aided by the negligent placing of the fly-wheel in a position where it could be struck by the elevator? Here the acts of Mottleson intervened, and the boy would not have been injured but for Mottleson's wrongful and negligent acts.

This is illustrated in the case of *Aymond v. Western Union Telegraph Co.*, 91 So. 671; 151 La. 184, where a boy was employed contrary to the statute as a messenger by the telegraph company. In the course of his employment he was required to cross railroad tracks, and in doing so was killed by reason of the negligence of the railroad. The court said:

> The defense is that this defendant acted in good faith, upon representation made by the boy that he was more than 16 years old, and appeared to be so; and that in any event this employment was not the proximate cause of his death.
>
> It may be that the good faith of the defendant is no excuse in such matters * * *; but we find it unnecessary so to hold in this case. For we find here, as shown above, that between the alleged negligence of this defendant and the injury suffered by the boy, there supervened the culpable act of a third party for whom the defendant was not responsible, and hence the defendant's alleged negligence was not the proximate cause of the injury.
>
> We find it unnecessary to decide, and we do not decide in this case, whether the defendant would or would not be liable had the supervening act of the third person been nonculpable. That is left absolutely open. We mean here to decide only this: that since between the alleged negligence of this defendant and the alleged consequence thereof there did supervene the culpable act of a third person for whom the defendant was not liable, then it follows that the act of the other party, and not the alleged negligence of this defendant, was the proximate cause of the injury.

> "The proximate cause of an injury is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury and without which the injury would not have occurred."
>
> *McCloskey v. Butte,* 78 Mont. 180; 253 Pac. 267.

Mottleson violated the statute, section 3095, when he employed Stewart Daly to work at an employment banned by the statute, assuming that the employment in this case was prohibited. This started going a course of events which finally resulted in the death of the boy. Then after this violation of the statute by Mottleson, Mottleson negligently placed the fly-wheel in a position so that it projected into the elevator shaft where it could be struck by the elevator when in motion. And then, Mottleson contrary to the orders of the defendant operated the elevator, and negligently operated it so that it struck the fly-wheel which fell upon the foot of Daly. Mottleson had been expressly forbidden to operate the elevator (R. 36, 52, 60, 63). When the fly-wheel had been moved to the elevator for loading, the elevator was below the floor level (R. 33), and the fly-wheel projected into the elevator shaft (R. 33, 67). It was shown (R. 57, 64-65) how to properly bring the floor of the elevator to a level with the floor of the basement, and that it required an expert to do it.

Hence, we must conclude that the injury was not the direct result of the work itself, but of the manner in which the work was done, the manner of its performance by the person who contracted to do it, the person who owned the machinery at the time.

It is said in *Laffery v. U. S. Gypsum Co.,* 111 Pac. 498; 83 Kan. 349:

> It is clear from the cases cited and many others in which the subject has been considered that the intrinsic danger of the undertaking upon which the exception is based is a danger which inheres in the performance of the contract, resulting directly from the work to be done, and not from the collateral negligence of the contractor.

Though the work which the owner of a building has contracted, with an independent contractor, to be done is of itself so inherently dangerous that the owner cannot shift responsibility for an injury, yet there is the exception which excuses the owner when the contractor employs negligent methods, or the manner of performance by the contractor is so negligent that an injury occurs.

Thus, in *Dayton v. Free,* 148 Pac. 408; 46 Utah 277:

> The injury here was not the direct result of the stipulated work but from the manner of doing it—from the failure or negligence of some one to warn the plaintiff of the missed hole or to establish and promulgate rules giving notice of such fact. Nor was the injury caused by the nonperformance of a duty owing by the company to the plaintiff. He was directly employed by Free & Taylor, or Stewart et al., and not by the company. Nor was he subject to its direction or control. And, as has been seen, it having neither reserved nor exercised direction or control over the work, or the time or manner of doing it, it owed him no duty to provide a safe place to work, or to warn or notify him of missed holes, or to

guard him against dangers incident to or created by the prosecution of the work, and certainly not to guard or protect him against the negligence of those who had employed him or with whom he labored.

Also, *Smith v. Naushon,* 60 Atl. 242; 26 R. I. 578:

The plaintiff alleges that he was an employee of the defendant, engaged in running a loom in defendant's mill; that while the loom was still, and the plaintiff was engaged in adjusting the yarn upon it, the servant of an independent contractor, who was setting up water pipes for a fire extinguisher system in the same room, having occasion to use a stepladder, negligently struck the ladder against the belt shipper attached to the loom, in consequence of which it started, and injured the plaintiff, * * * but the sole proximate cause of the accident was the carelessness or negligence of the agent of the contractor. It was an "independent act of a responsible person," and one which the defendant had no reasonable ground to apprehend would occur from permitting him to work there.

Also, *Schmidlin v. Alta Planing Mill Co.,* 150 Pac. 983; 170 Cal. 589:

Appellant recognizes the general rule that exonerates the employer of an independent contractor and fixes the responsibility upon the contractor himself, but insists that his case comes under the exception to the rule which exception sustains an action against the employer under the doctrine of respondeat superior, where the performance of the contract in its general nature is necessarily injurious to a third person, or where,

under grant or permission to do a specific work in a careful manner, which otherwise one could not lawfully do at all, the employer is not permitted to avoid the consequences of the negligent performance by his contractor of the duty primarily imposed upon him—the employer. * * * The other class of cases is that where danger and peril inhere in the very nature of the work, and where, therefore, it is not in consonance with justice that the responsibility for injury resulting from or occasioned by this peril should be passed on to the contractor. But appellant's effort to bring this case within that category is manifestly futile. There is nothing inherently dangerous in the character of the work here to be done, and, if it should even be conceded that it were, it is plain that it was no hazard or peril inhering in the nature of the work that caused the accident. It was the merest negligence—negligence almost gross in character—the hauling up of a bucket of paint, the bucket itself not even being fastened, upon an empty scaffold carrying no person to direct and guide it, and no person to look out for the bucket of paint. Such conduct in its nature is too plain to call for further consideration, and may be dismissed with the single comment that manifestly this negligent act formed no attribute, part, or characteristic of the work itself. * * * The place where plaintiff was at work when injured was not in and of itself unsafe; it was not unsafe even because the employees of an independent contractor were painting or were about to paint signs on the wall above him. It was rendered unsafe solely by the negligence of the painters in the performance of their task.

Also, *Nickey v. Steuder,* 73 N. E. 117; 164 Ind. 189:

This action was brought by appellee to recover damages for injuries sustained by him while in the employ of appellants Nickey, Nickey & Nickey, who owned and operated a sawmill in which "saw logs, trees, and timber were manufactured into dimension stuff." The slabs were sawed into stove wood in the mill, and carried by a carrier a distance of 50 feet or more from said mill, and thrown upon the ground. Appellee at the time of his injury was engaged in throwing said stove wood back from where it was deposited by the carrier. Appellant Wessel, who had purchased some of said stove wood, entered upon the mill premises with a wagon for the purpose of hauling the same away, and while engaged in loading said stove wood threw a stick thereof against appellee and injured him. At the time appellee was injured he was under the age of 14 years. * * * The right to recover against the Nickeys is based on sections 7087b, 7087y, Burns' Ann. St. 1901; the first of which provides that "no child shall be employed in any manufacturing or mercantile establishment, mine, quarry, laundry, renovating works, bakery or printing office within this state." * * * The employment by Nickey, Nickey & Nickey of a person under the age of 14 years, in their sawmill, was a violation of said sections 7087b and 7087y, supra, and was negligence per se, and they were liable to such person for any injury of which that was the proximate cause, provided the injured party was not guilty of contributory negligence. * * * In such a case the employer will not be liable merely because his act constituted a violation of law, but only if it proximately caused the injury com-

plained of. Although the violation of such a statute is negligence per se, there must be a causal connection between the unlawful act and the injury, which must be shown in the pleading and by the proof or the action fails. Such causal connection is interrupted by the interposition between the negligence and the injury of an independent, responsible human agency. * * *

Tested by this rule, the negligence of appellants Nickey, Nickey & Nickey in employing appellee in the sawmill was not the proximate cause of his injury, for, under the authorities cited, it cannot be said that appellants, in the exercise of ordinary care, ought to have anticipated or foreseen as the natural or probable result of such employment that appellee would be injured by an independent, responsible human agency. It is alleged that "Wessel negligently and carelessly threw a stick of wood or timber weighing about eight pounds against plaintiff thereby injuring him." The intervening agency was an independent human agency, direct and positive in its nature and effect, and certainly, under the rule stated, the injury to appellee cannot be attributed to the negligence of the Nickeys in employing him in their mill. The court erred, therefore, in overruling the demurrer of Nickey, Nickey & Nickey.

Colen v. Gladding etc. Co., 136 Pac. 289; 166 Cal. 354;

Missouri Valley etc. Co. v. Ballard, 116 S. W. 93; 53 Tex. App. 110.

Grant that a violation of section 3095 is negligence per se, yet a violation does not prove liability. The mere violation of the statute is not sufficient to fasten

liability upon a defendant. It is said in *Stroud v. Chicago, Milwaukee & St. Paul Ry. Co.*, 75 Mont. 384; 243 Pac. 1089:

> Failure of the defendant to comply with the statute requiring the blowing of the whistle and sounding of the bell on approaching the crossing was negligence per se. * * * But the mere fact that defendant was proven negligent did not establish plaintiffs' right to recover. They were required to go further and show that the defendant's alleged negligence was the proximate cause of the injuries which they received.

Monson v. La France Copper Co., 39 Mont. 50; 101 Pac. 243;

Barrett v. U. S. R. R. Adm., 196 Iowa 1143; 194 N. W. 222;

Hickey v. Missouri Pac. R. R., 8 Fed. (2d) 128.

We submit that the negligent and unauthorized acts of Mottleson cut between any alleged violation of the state by the defendant and the injury to Stewart Daly, and that such acts of Mottleson were the proximate causes of the injury.

NEGLIGENCE OF STEWART DALY.

The evidence shows without contradiction that all Stewart Daly did was the picking up of bolts and the carrying of tools. He had no part in the moving of the fly-wheel (R. 31). The case of the plaintiff presents evidence which makes out prima facie contributory negligence on the part of the boy. He having nothing to do with the moving of the machinery,

should not have put himself where he could have been hurt by it. Assuming the plaintiff's contention that the method of moving the fly-wheel was dangerous, then the boy was in a known place of danger, where his duties did not call him and when he was of an age to appreciate the danger. This evidence is unexplained by the plaintiff. This case is clearly within the doctrine of many Montana cases, which is:

> Whenever, however, the plaintiff's own case presents evidence which unexplained, makes out prima facie contributory negligence upon his part, there must be further evidence exculpating him or he cannot recover.
>
> *Grant v. Chicago, Milwaukee & St. Paul Ry. Co.,* 78 Mont. 97; 252 Pac. 382, and cases cited.

PARTIES IN PARI DELICTO.

In the State of Montana any right of action the minor had, prior to his death, for injuries survives and is to be maintained by his administrator.

> *Melzner v. Northern Pacific Ry. Co.,* 46 Mont. 162; 127 Pac. 146.

Such action is solely for the benefit of his heirs, and the proceeds of the action cannot be considered any part of his estate.

> *Batchoff v. Butte Pacific Copper Co.,* 60 Mont. 179; 198 Pac. 132.

Section 7073, subsection 2, provides:

> "If the decedent leaves no issue, nor husband nor wife, the estate must go to his father and

mother in equal shares, or if either be dead then to the other."

The father and mother of Stewart Daly are his heirs.

The father and mother are violators of the law under which they seek, through the administratrix, to hold the defendant liable. Section 3096, Revised Codes of Montana of 1921, says that

> "Any parent * * * who shall permit, suffer or allow any such child to work or perform service for any person, * * * or who shall permit or allow any such child * * * to retain such employment as is prohibited in the preceding section * * * shall be guilty," * * *.

Stewart Daly was under the care, custody and control of his parents.

> "The father and mother of a legitimate unmarried minor are equally entitled to its custody, services and earnings."
>
> Section 5834, Revised Codes of 1921.

The parents owed the duty to keep the child out of danger. (*Harrington v. Butte, Anaconda & Pacific Ry. Co.,* 37 Mont. 169; 95 Pac. 8.) The parents cannot be allowed to say they did not know where the child was. They were in a position to know. They knew, however, he was working for Mottleson (R. 38, 39), and knew that Mottleson was in the junk business (R. 38, 40). Being in a position to know where the boy was working it was their duty to find out, and what they could have found out they are presumed

to know. It was their duty to see that he was in no place prohibited by statute.

"Permit" in the two sections, 3095 and 3096, must have the same meaning. The parents should not fasten liability on the defendant by one meaning and excuse themselves by another meaning. If the defendant is in the wrong, the parents are in the wrong; they are in pari delicto, and when in such position the courts will leave them there.

Melville v. Butte-Balaklava C. Co., 47 Mont. 1; 130 Pac. 441;

Jackson v. Lomas, 60 Mont. 8; 198 Pac. 434;

Kallio v. Northwestern Imp. Co., 47 Mont. 314; 132 Pac. 419.

In the *Jackson* case, above, the court says:

> It is the general rule that the violation of a penal statute or ordinance by one resulting in injury to another is negligence per se. * * * But this rule fails of application where the parties are in pari delicto.

It is respectfully submitted that the judgment should be set aside and the action dismissed.

Dated, Butte, Montana,
August 27, 1930.

JOHN K. CLAXTON,
A. C. MCDANIEL,
Attorneys for Appellant.

No. 6112

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

SWIFT AND COMPANY (a corporation organized and existing under and by virtue of the laws of the State of West Virginia),
Appellant,

vs.

FREDA DALY, as administratrix of the estate of Stewart Daly, deceased,
Appellee.

BRIEF FOR APPELLEE

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McKEE PRINTING CO., BUTTE, MONT.

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Appellee.

BRIEF OF APPELLEE

The counsel for the plaintiff at the conclusion of the argument which was made only on the measure of damages, because he expected and had announced previously in the argument that he would request the Court to grant a motion for a peremptory verdict as to all features except damages, stated:

Mr. Maury (at the end of the argument): "And now having argued the measure of damages in this case,

I submit that your Honor should instruct the jury peremptorily to find a verdict for the plaintiff in this case." (69 R. 15-20.)

There was no objection or protest from defendant's counsel. The court then instructed the jury peremptorily. (75 R. 20-23.)

Concluding his charge, the court asked, "Any exceptions for the plaintiff?"

Mr. Maury: "No, sir."

The Court: "Any for the defendants?"

The record is silent. No exception was taken. The record is perfectly correct. It was prepared by the appellant as to the bill of exceptions. In addition to the bill of exceptions the Clerk's minutes show the same state of the record. (20 R. 16-23.) There was no exception to the verdict. (21 R. 5-10. 76 R. 15.)

Under the state practice in Montana, error cannot be predicated on the ruling of a trial court unless it be objected to or protested at the time it is made. The motion of plaintiff's counsel was foreshadowed before it was made and there was neither objection nor protest. The court granted the motion and charged accordingly and asked for an announcement of any exception that the defendant might have and none was stated.

While, whether any review would be made of similar action of a trial court by a Montana appellate court, is somewhat moot, yet we would say that the absence of a protest or objection to the motion for the peremptory instruction would completely deprive the appellant here of any right to review in a Montana state court; the

absence of any exception deprives the appellant of any right to review in this court. The practice respecting exceptions in the Federal courts is unaffected by the conformity act, Rev. Stat. Sec. 914, U. S. C. title 28, Sec. 724. United States v. United States Fidelity & G. Co., 236 U. S. 512; 35 Sup. Ct. Rep. 298.

In Montana, by special statute, it is permitted a defendant to assert for the first time in the appellate court, that a complaint does not state facts sufficient to constitute a cause of action. The rule at common law and in the Federal courts is that such defect as may exist may be cured by verdict submitted to without objection by the defendant. If the defendant still claimed a defect of any kind in the complaint (there was no defect, the complaint was entirely sufficient in every particular) it was its duty in order to avoid the effect of the court's instructions to reassert at that time that the motion to instruct peremptorily should not be granted because of any claimed deficiency of the complaint or because of error previously made, if claimed, in overruling the demurrer.

However, the learned counsel in printed argument does not charge that the complaint was not sufficient to state a cause of action. By putting in testimony after the denial of the motion for non-suit, the defendant waived any exception that it took to that act of the court.

Union Pacific Railway v. Daniels, 152 U. S. 684.
Courtnay v. Kind (C. C. A. 9th), 220 Fed. 112.
Erie Ry. Co. v. Linnekogel, 248 Fed. 389 (C. C. A. 2nd).

Likewise the objection that the evidence is insufficient to justify the verdict is not open to the defendant in view of the failure of defendant at the close of the trial to move for a directed verdict or request a perempory instruction.

Sharpless Separator Co. v. Skinner (C. C. A. 9th), 251 Fed. 25.

McBride v. Neal (C. C. A. 7th), 214 Fed. 968.

> In an action at law the burden is on the plaintiff in error to establish the existence of those errors of which he complains, and in the absence of proof by the record that a question of law arose, and that it was presented to and ruled upon by the Court below no error is established, because none could arise concerning a question which was not presented, considered or decided by the trial court (citing authority). Because there was no request, and no ruling on a request, for a peremptory instruction in favor of the plaintiff, and because there was no exception to any ruling relative to the matters now assigned as error, there is nothing in this case for this court to review.
>
> It is indispensible to a review in the Courts of the United States of any ruling of a trial court on the admissibility of evidence, or in the charge of the Court, or the submission of the case to the jury that the ruling of which complaint is made should be challenged, not only by an objection, but by an exception taken and recorded at the time, to the end that the attention of the trial judge may be sharply called to the question presented, and that a clear record of his action and its challenge may be made."
>
> *Mexico Co. v. Larkin* (C. C. A. 8th) 195 Fed. 495.

We therefore, think it aptly in order and we do now move the court to affirm the judgment without further

examination of the record than such as has been suggested; or to dismiss the appeal.

R. Lewis Brown,
George R. Maury,
H. Lowndes Maury,
Attorneys for the Appellee.

Without waiving the foregoing motion, we assert that the action of the trial court was in all respects correct, and should be affirmed even if legally challenged in the court of appeals. There is no plea of contributory negligence in the answer. The first plea of that kind appears in the brief of counsel in the appellate court and in the argument.

In Montana, the rule is the same as the rule in the Federal courts, but the Federal court rule is applied even when the trial is had and the cause of action arose in a state where the practice is that contributory negligence must be negatived in the complaint or declaration. *Hemingway v. Ill. Cent. Ry. Co.* (C. C. A. 5th) 114 Fed. 843.

Naivity is displayed by a plea that is in the answer of the appellant. The statement in this plea of fellow service disperses most of the argument found in appellant's brief. After discussing independent causes, independent contractors, too restricted construction of the statute, and other questions raised by counsel, this plea ends up with the following words, "that any injuries inflicted upon the said Stewart Daly, were caused by

the negligence of a fellow servant, his own employer and co-servant." (16 R. 7-10.)

A fellow servant and a co-servant necessarily implies a common master. The common master here was Swift and Company, the appellant, as alleged in the complaint and proven in the testimony. The work was being done on the premises owned, possessed, controlled by Swift in the furtherance of its business and in hazardous work which it could not delegate to an independent contractor so as to relieve itself from liability if it was done illegally or negligently.

Much of the appellant's brief is addressed to the idea that Mottleson's violation of the statute introduced an independent supervening cause which cut off the operation of the other cause. It seems to us that the learned counsel neglect to consider the elementary rule of law that there may be more causes than one which pervades the law of torts and likewise the counsel neglect to consider that two persons may join in the same tort.

The record is a complete answer to every statement made in the brief. Part of counsel's brief is devoted to the parties being in pari delicto and they indulge the presumption that the boy's father and mother committed a breach of the criminal code when there is no evidence to sustain the assumption of counsel. The ordinary presumption is that they did not, and the testimony of each of them is that neither one knew that the boy was working in the plant or near the elevator.

Freda Daly, the mother, says: "I did not know at any time between the 20th and 24th days of August,

1928, that my son, Stewart Daly, was working on the premises of Swift and Co." (38 R. 15.)

Phil Daly, the father, says: "I did not know at any time between the 20th of August, 1928, and the 24th of August, 1928, that my son was working on the premises of Swift and Co." (39 R. 16.)

Some of the counsel's brief is devoted to the question of whether Swift should have knowledge or not of the presence of the boy in the plant and on the elevator. It is alleged in the complaint, paragraph 9:

> That continuously eight hours each day or thereabouts from Monday, the 20th day of August, 1928, until Friday, the 24th day of August, 1928, Swift & Company being engaged in business in Montana knowingly and negligently and wrongfully and unlawfully permitted to be employed and to render and perform services and labor in, on, and about a certain freight elevator in its plant at 724 South Arizona Street in Butte, Silver Bow County, Montana, Stewart Daly, a child under the age of 16 years, to wit, of the age only of 11 years, 8 months and 22 days, and the said elevator being in operation constantly during such time, and such employment and service and labor of the said child, Stewart Daly, being at all times, until after he was injured, unknown to Philip Daly, the father of the said child, and unknown to the mother, this administratrix, and such conduct of Swift & Company was a proximate and efficient and a direct cause of the injury to Stewart Daly, hereinafter set out, and the elevator in motion overturned on Stewart Daly the (6) half fly-wheel and so injured him that he died after lingering about three days.

This allegation in the complaint may be considered in connection with other allegations in the complaint

that the boy was an invitee of Swift and Company about the basement and elevator shaft, that Swift and Company owned the packing plant, had many servants working therein and occupied, controlled, possessed and packed meats in the said packing plant. (4 R. 1.) There was a further allegation that Mottleson and York Ice Machine Company, in making the said contracts and in doing the work, were furthering solely and entirely the plan of work and the business designs of Swift in its premises, in its plant occupied, etc., by Swift. These allegations were followed by testimony so convincing that a judge is not warranted in law in submitting to a jury the negative of such facts for a speculative verdict.

W. J. Young was the manager of the Butte Branch plant of Swift and Company. (51 R. 15.) He says: "I saw Stewart Daly upon the premises. I don't remember whether that was the second or third day." (52 R. 16.) "I first saw Stewart Daly in the basement which was not a place for customers but a place for employees. That might have been two or three days before he was hurt. Richards is the branch house foreman over the men in the branch house. House foreman, we call him, and that includes the basement." (53 R. 20.)

Richards, the floor manager, was at work on August 20th, 21st, 22nd, and 23rd. (54 R. 16.) Quoting from testimony of Richards: "I saw the boy picking up bolts and helping Mr. Mottleson around there, handing the men tools, wrenches, picking up bolts and bolt heads. When Mr. Mottleson started to dismantle the ice ma-

chine the boy was there and was there all the time Mottleson was on the floor until the boy was injured." These witnesses were produced by the defendant.

We call to the attention of the court the words in our statute which are not often found in other statutes of a similar import: "Or permit to be employed," and also the words "to render or perform any service or labor whether under contract of employment or otherwise." These words precede "in, on, or about any work shop, factory or passenger or freight elevator." The statute is correctly copied in the brief of appellant's counsel so that any obedience to the rule by us would be surplusage. The words "or permit to be" are not found in the North Carolina statute but that court said that such words were implied.

We quote a paragraph from a North Carolina case that will interest the court we think, even though the court in our opinion should grant the motion to affirm or dismiss. *McGowan v. Ivanhoe Co.* (N. C. 1914), 82 S. E. 1028, N. C. C. A. Vol. 7, p. 867.

> "In the case referred to, the fact of the minor being a regular employee was unquestioned, while, in the present case it may become a matter of dispute, but the language of the act is that no child under twelve shall be employed or worked in any factory, etc., and if this child though not on the regular pay roll, was permitted to work at the mill to the knowledge of the owner, superintendent, or other agent fairly representing the management, or if he worked there so openly and continuously that the management should have observed and noted his occupation and conduct, his case would come within the terms and meaning of the law."

Other cases in point and on proximate cause:

Wind River Lumber Company v. Frankfort Marine Company (C. C. A. 9th, 196 Fed. 340).

The court there says: "The statute should be construed in harmony with its purpose which was to protect children and to regulate their employment." . . . "When the condition on which a minor is permitted to be employed is disregarded, his employment is as illegal as if he were employed in the face of an absolute prohibition."

Also in point are:

Purtell v. Philadelphia, etc. (Ill.), 99 N. E. 899;
Evans v. Dare Lumber Co. (N. C.), 93 S. E. 430, 30 A. L. R. 1498;
Queen v. Coal Co. 32 S. W. 460.
John v. Northern Pacific Railroad, 42 Montana at 46 (not in pari delicto).

The Federal Judges are not merely moderators of a town meeting. A dispute which warrants submitting particular issues to a jury in a Federal court is a substantial dispute and involves a substantial conflict of evidence. Here there was no conflict at all except on the question of damages. One of the counsel in this case was counsel in the first case where the Montana Supreme Court construed the survival statute. The case is mentioned in appellant's brief: *Melzner, Admr. v. Northern Pacific Railway Co.,* 46 Mont. 162. Refreshing the memory from a brief written in that case a $5,000 verdict was sustained where the death occurred

very quickly after the injury in *Kyes v. Valley Telephone Co.* (Mich.), 93 N. W. 623, and the same amount in *Hesse v. Meriden Coal,* 54 Atl. 299. In the Melzner case cited by counsel the amount of the verdict sustained does not seem to appear in the printed report. Opposing counsel will not disagree if an inspection of the files is made in our statement that the amount was $14,000 finally affirmed.

No contention was made in the trial court by answer or by statement of counsel that the parties were in pari delicto. Motion for non-suit (44 R.-45 R.) The theory of a case may not be changed between trial court and appellate court as a general thing. The three cases cited at the close of appellant's brief are on different statutes. The Melville v. Butte-Balaklava C. Co. was on a statute which made both employer and employee guilty if the eight-hour law were not observed. The Jackson v. Lomas case cited, held that a child injured through firing a squib contrary to a City Ordinance was equally guilty with a merchant selling the squib against the provisions of another section of the ordinance. It is noticeable that the statute on which this case is based does not make working contrary to its terms criminal, but merely the employing or permitting to be employed, criminal.

We submit that the judgment should be affirmed or the appeal dismissed.

Respectfully,

R. Lewis Brown,
George R. Maury,
H. Lowndes Maury.

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Appellant,

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Appellee.

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

The appellee in her brief raises the uoint that the appellant waived his motion for a non-suit and exceptions thereto by putting in evidence. That is not the rule in the State of Montana. In this State if the defendant does not stand upon his motion for a non-suit but introduces evidence in support of his answer, the only risk he assumes is in supplying defects in the plaintiff's case and if his evidence does not in some way bolster the plaintiff's evidence, then he still is entitled to all the rights and benefits of his motion for a non-suit.

Waterson vs. Hill, 84 Mont. 549, 276 Pac. 948.

Under the Conformity Act, the trial of an action at law in Federal Courts must correspond as nearly as may be to the State practice, and in a case involving a motion for a non-suit, the Supreme Court of the United States held that the practice on the motion for a non-suit must conform to the State practice.

Barrett vs. Virginia Railway Company, 250 U. S. 474, 63 Law Edition, 1092.

Neil Bros. Grain Co. vs. Hartford Fire Insurance Co. 1 Fed. (2 d.) 904.

Shank, vs. Shoshone and Twin Falls Water & Power Co. 205 Fed. 833.

Of course there are many decisions by Federal Courts that a motion for a non-suit is waived by the defendant putting in evidence, but such cases are based upon a State statute, entirely different to Montana. As an example of such cases, see *Cole vs. Mendenhall,* 240 Fed. 641.

Section 9387, Revised Codes of Montana is as follows:

"WHAT DEEMED EXCEPTED TO. Every order, ruling, and decision of every kind and nature made and entered by any court, judge, or referee, and every verdict, finding, decree, or judgment of a court is deemed excepted to, and it shall not be necessary to ask for or note an exception but nothing herein contained shall be deemed to dispense with the necessity of making objections, nor to dispense with the preparations of a bill of exceptions in all cases in which the same is required by law ,nor shall this act dispense with the making and settlement by sections 9370 and 9371 of this code. This act shall not affect the procedure for the settlement of instructions, save that no exception need be noted to any in-

struction, nor to any order of the court relating thereto."

Hence we submit that no right was waived on the motion for a non-suit and the exception to the order denying it was not waived, by introduction of evidence by defendant. The appellee also claims that a defect in the complaint was waived by a failure to object to the court's instructions. Under the practice in this State, an objection to the sufficiency of the complaint may be raised at any time and by section 9136 of the Revised Codes of Montana it is so provided.

OBJECTIONS—WHEN DEEMED WAIVED

"If no objection is taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

When an objection has once been made, it does not have to be thereafter repeated.

Ferrat vs. Adamson, 53 Mont. 172, 163 Pac. 122.

The appellant raised the sufficiency of the complaint by a demurrer. The order of the court in overruling the demurrer is the first assignment of error. This objection having been once raised it continues throughout the trial. But even assuming the appellee is right in her contentions in regard to the non-suit and as to the sufficiency of the complaint, nevertheless, the evidence is wholly insufficient to

support any verdict. This has been fully discussed in our first brief.

The appellee on page 5, of her brief, claims that the appellant admits that Stewart Daly was a servant. The appellee's allegations in its answer means and is to the effect that Stewart Daly was a co-servant of his own employer, David Mottleson. We have not in our answer in any manner or at all admitted that Stewart Daly was a servant or employee of the appellant. Our sole allegation is that he was the co-servant of his employer, David Mottleson, and the pleading can not be otherwise construed.

It is respectfully submitted that the judgment should be set aside and the action dismissed.

Dated, Butte, Montana,
September 12, 1930.

JOHN K. CLAXTON,
A. C. McDANIEL,
Attorneys for Appellant.

No. 6116

United States
Circuit Court of Appeals
For the Ninth Circuit.

RALPH WIEN,

Appellant,

vs.

ALASKAN AIRWAYS INC., a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Territory of Alaska, Fourth Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 6116

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

HARRY E. PRATT, Fairbanks, Alaska, and
LOUIS K. PRATT, Fairbanks, Alaska,
Attorneys for Defendant and Appellant.

JOHN A. CLARK, Fairbanks, Alaska, and
CHAS. E. TAYLOR, Fairbanks, Alaska,
Attorneys for Plaintiff and Appellee.

In the District Court for the Territory of Alaska,
Fourth Division.

No. 3274.

ALASKAN AIRWAYS, INC., a Corporation,
Plaintiff,

vs.

RALPH WIEN,
Defendant.

COMPLAINT.

The above-named plaintiff, Alaskan Airways, Inc., complains of the defendant Ralph Wien, and for cause of action against him alleges:

(1) That, at all times mentioned herein, the plaintiff was, and is now, a corporation duly organized and existing under the laws of the State of Delaware, having its principal office at Wilmington, in the county of New Castle, State of Delaware. That the principal object and business for which

said corporation was formed, and in which it is engaged, is the transportation in intrastate and interstate and foreign commerce, by aircraft, of passengers and freight of every nature and description.

(2) That plaintiff is now engaged in such business in Alaska, with an office and duly authorized agent at Fairbanks, Alaska; has paid its annual license fee last due to the Territory of Alaska; and has otherwise complied with all of the laws, rules, and regulations of the Territory of Alaska pertaining to foreign corporations.

(3) That the defendant Ralph Wien was at all of the times mentioned herein, and is now, a resident of Fairbanks in the Territory of Alaska.

(4) That, during the year 1929, and prior to the sixth day of August of said year, the said defendant was a stockholder and an active member of the Wien Alaska Airways, Inc., a corporation then and there existing under the laws of Alaska and engaged in the transportation of passengers and freight by aircraft in and about the Territory of Alaska. That said defendant was then and there employed by said corporation as mechanic and that he also took an active part in the general management of said company. [1*]

(5) That, on or about the sixth day of August, 1929, at Fairbanks, Alaska, this plaintiff purchased all of the property, assets, and business of the said Wien Alaska Airways, Inc., and all of the right, title,

*Page-number appearing at the foot of page of original certified Transcript of Record.

and interest of the said Ralph Wien therein, which said property consisted of hangars, airships, tools, furniture, spares, extra parts, equipment, and property of every nature and description, wheresoever situated together with the goodwill of the business of said corporation, saving and excepting only from said purchase the cash on hand and accounts due and payable to said company, the consideration for such purchase being the sum of Sixty-five Thousand Dollars.

(6) That the property so purchased, except the goodwill of said business, was of the value of Forty Thousand Dollars, the same being the cost landed price thereof at Fairbanks, and that the balance of said purchase price was paid in consideration of the goodwill of said company and of the individual stockholders thereof, including the said defendant Ralph Wien, and of the promises, covenants, and agreements of the said stockholders, including the said Ralph Wien, made individually and collectively, in writing, with this plaintiff, that the said parties, including the defendant Ralph Wien, would not, for a period of three years from said date, enter into competition in any way with this plaintiff, and would not enter into any business or become stockholders or have any interest in any other company or copartnership that would in any way compete with this plaintiff in such aviation business, and the said parties, including the said Ralph Wien, further promised and agreed as part consideration for such purchase price, that he would not, during such period of three years from the

sixth day of August, 1929, within the Territory of Alaska, accept any employment with any airplane company, corporation, association, or individual, who may be engaged commercially in any business that would in any way compete with the business of this plaintiff. [2]

(7) That the said parties, including the said Ralph Wien, then and there agreed in writing that, in the event of a violation of said agreement on his part, this plaintiff or its successor in interest would be entitled to an injunction to prevent the continuance of such violation, and that the party so violating said agreement should be liable for damages for the breach of said contract. That a copy of such agreement is attached hereto, marked Exhibit "A," and made a part of this complaint.

(8) That, notwithstanding the said agreements, covenants, and promises on the part of the said defendant, he, the said Ralph Wien, on or about the tenth day of January, 1930, entered into the employ of and associated himself with one Percy Hubbard and one A. Hines, copartners doing business under the name and style of the Service Motor Company, at Fairbanks, Alaska, and carrying on a general transportation of passengers and freight between points in Alaska, and that, ever since the said tenth day of January, 1930, the said Ralph Wien has been engaged as aviator and pilot of an airplane for said copartnership, and, in violation of his said promises and agreements, continues to carry on the business of commercial flying, in active competition

to the business of this plaintiff, to the damage of plaintiff.

(9) That, on or about the twentieth day of January, 1930, this plaintiff caused written notice of such violation of said agreement to be served upon the said Ralph Wien, and then and there notified the said defendant to immediately cease such violation and such competition, but that, notwithstanding said notice and demand, the said defendant Ralph Wien continues to act as aviator and flier for said Service Motor Company, and continues to violate the promises, covenants, and provisions of said agreement, to his damage in the sum of One Thousand Dollars.

(10) That unless the said defendant Ralph Wien is restrained and enjoined from continuing such employment, and from engaging [3] in the business of aviation either as flier, pilot, mechanic, manager, assistant, or in any other capacity whatsoever, either for himself or for any other person or persons whomsoever that will interfere with the business of this plaintiff, this plaintiff will suffer irreparable damage. That the defendant Ralph Wien is not financially able to respond to any judgment for damages which might be obtained against him and that this plaintiff has no other speedy or adequate remedy at law.

WHEREFORE plaintiff prays judgment against the said defendant as follows:

1st. That he be restrained and enjoined, for the period of three years from the sixth day of August, 1929, from engaging in any aviation busi-

ness, either as flier, pilot, mechanic, manager, assistant, or *any* any other capacity whatsoever, either for himself or for any other person or persons whomsoever, that will in any manner interfere with or compete with the business of this plaintiff.

2d. That plaintiff recover the costs and disbursements of this action.

3d. For such other and further relief in the premises as to the Court may seem just and equitable.

JOHN A. CLARK,
CHAS. E. TAYLOR,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Chas. E. Taylor, being first duly sworn according to law, on his oath deposes and says:

I am one of the attorneys for the plaintiff in the above-entitled action, and make this verification for and on behalf of said plaintiff, for the following reasons, to wit: that the person upon whom service of summons might be had on said corporation is not now within the Territory of Alaska; that this action is founded upon a written instrument, the original whereof is in my possession [4] as one of the attorneys for the plaintiff; that I have read the foregoing complaint, know the contents thereof, and the same is true as I verily believe.

CHAS. E. TAYLOR.

Subscribed and sworn to before me on this the 31st day of January, A. D. 1930.

[Seal] R. H. GEOGHEGAN,

Notary Public in and for the Territory of Alaska.

My commission expires 12 Octr., 1933. [5]

EXHIBIT "A."

This Bill of Sale, Made and executed on this, the 6th day of August, A. D. one thousand nine hundred twenty nine, by and between:

Wien Alaska Airways Incorporated, and Ralph Wien, Noel Wien, and G. R. Jackson, of Nome, Territory of Alaska, parties of the first part, and

Alaska Airways Incorporated, a corporation organized under the laws of the State of Delaware, party of the second part,

Witnesseth:

That the parties of the first part, for and in consideration of one dollar, and other good and valuable considerations, to them in hand paid, have bargained, sold, assigned, and transferred, and by these presents do bargain, sell, assign, and transfer, unto the party of the second part, all and singular the assets of the parties of the first part, consisting in hangars, airships, tools, furniture, spares, extra parts, and equipment of every nature and description belonging to said Wien Alaska Airways Incorporated, wheresoever situate within the Territory of Alaska, as per inventory heretofore furnished by parties of the first part to party of the second part, together with all equipment, supplies, and extra parts ordered, acquired, or purchased

since said inventory was prepared, whether the same have been delivered or are in transit, save and except, however, that there are excluded from this transfer all cash on hand, accounts and *n*ills receivable, due, owing, or unpaid to the party of the first part at this time, or that may be earned, or that may be due, owing, or unpaid to the party of the first part at midnight on the 5th day of August, A. D. one thousand nine hundred twenty nine, and all said cash on hand, outstanding accounts and bills receivable are retained by the party of the first part; provided further that party of the first part covenants and agrees to pay all outstanding indebtedness, claims, [6] and charges of every nature and description due and owing from Wien Alaska Airways Incorporated at midnight on the 5th day of August, A. D. one thousand nine hundred twenty nine, and party of the first part does hereby assign, transfer and set over unto the party of the second part all the goodwill of the business heretofore conducted by the party of the first part in the Territory of Alaska, together with all privileges and rights that arise therefrom or are appurtenant thereunto.

That it is the true intent hereof that the party of the first part assigns to the party of the second part all of its assets, other than cash on hand, accounts and bills receivable, including its goodwill, and in consideration thereof the parties of the first part agree, on behalf of themselves, their heirs, executors, administrators, successors in interest, and assigns, that neither said corporation nor any

of the stockholders thereof will, for a period of three years from the 6th day of August, A. D. one thousand nine hundred twenty-nine, enter into competition in any way with party of the second part herein; that the parties of the first part will not enter into any business that will conflict in any way with the party of the second part in the conduct of its business, and will not become stockholders or have any interest in any other company or copartnership, and will not enter into any agreement with any individual for the establishment, operation, conduct, or management of any business that will compete with the business of party of the second part, and will not, during said period, within the Territory of Alaska, accept employment with any airplane company, corporation, or association, and will not associate themselves with any individuals who may be engaged commercially in conducting any business that would in any way compete with the business of party of the second part, and will not assist in the organization of or be interested in any business within the Territory of Alaska, during a period of three years from the 6th day of August, A. D. one thousand [7] nine hundred twenty nine, that would compete in any way with the business conducted by the party of the second part, save and except that any of the individual stockholders of said corporation party of the first part herein, may enter the employ of the party of the second part in any capacity that is mutually agreeable, and it is further understood and agreed that, if any of the individual parties

of the first part do enter into business whereby they or any of them may find it advisable or advantageous to use an airplane in connection with said business, for their own individual use, they may do so, but neither they nor any of them shall use said airplane for commercial purposes or for the carrying of freight or passengers for hire.

That it is understood that the transfer by party of the first part is a transfer of all its assets and goodwill, both of itself as a corporation and of its stockholders, and its agreement not to enter into competition with the party of the second part or its successors in interest is a part of the consideration for the purchase by party of the second part of the assets and goodwill of the party of the first part.

That, in the event of a violation by parties of the first part of this agreement not to enter into competition with party of the second part, party of the second part or its successors in interest shall be entitled to an injunction to prevent the continuance of such violation and the parties so violating this agreement shall be liable for damages for vreach of this contract.

That it is understood that party of the second part shall take possession of all said assets on the 6th day of August, A. D. one thousand nine hundred twenty-nine, and parties of the first part agree to deliver to party of the second part all said assets as the same exist on the 6th day of August, A. D. one thousand nine hundred twenty nine, and in as

good condition as they are on said last mentioned date. [8]

To have and to hold all said properties unto the said party of the second part and to its successors in interest and assigns forever.

That, in construing this agreement, it is understood that the party of the second part will be engaged in the aviation business, carrying passengers and freight for hire, and that the agreement on the part of the parties of the first part to refrain from entering into any business that would compete with party of the second part refers to said aviation business and business incidental thereto.

That the terms and conditions of this bill of sale and agreement shall be binding on the parties of the first part, their and each of their heirs, executors, administrators, successors in interest, and assigns.

IN WITNESS WHEREOF, the parties of the first part have hereunto set their hands and seals on the day and year hereinabove first written.

WIEN ALASKA AIRWAYS INCORPORATED. (Seal)
By NOEL WIEN, President.
By G. R. JACKSON, Secretary.

NOEL WIEN. (Seal)
RALPH WIEN. (Seal)
G. R. JACKSON. (Seal)

In the presence of:
E. STANGROOM.
RUTH WALSH.

United States of America,
Territory of Alaska,—ss.

This is to certify that, on this, the 6th day of August, A. D. one thousand nine hundred twenty-nine, before me, the undersigned, a notary public for the Territory of Alaska, residing therein, duly commissioned and sworn, personally appeared Noel Wien and G. R. Jackson, as president and secretary respectively of Wien Alaska Airways Incorporated, a corporation, by me known to be the persons who executed the foregoing instrument on behalf of said corporation and as individuals, and they acknowledged to me that they signed and sealed it in their said individual and representative capacities, as the free and voluntary act and deed of themselves [9] and of their said principal for the uses and purposes therein specified.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office on the day and year above in this certificate first written.

[Seal] A. F. WRIGHT,
Notary Public in and for the Territory of Alaska.

My commission expires Oct. 14, 1929.

United States of America,
Territory of Alaska,—ss.

This is to certify that, on this the 6th day of August, A. D. one thousand nine hundred twenty-nine, before me, the undersigned, a notary public for the Territory of Alaska, residing therein, duly commissioned and sworn, personally came Ralph

Wien to me known to be the individual mentioned in and who executed the foregoing instrument and he acknowledged to me that he signed it as his free and coluntary act and deed for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on the day and year above in this certificate first written.

[Seal] A. F. WRIGHT,
Notary Public in and for the Territory of Alaska.

My commission expires Oct. 14, 1929.

[Endorsed]: Filed Jan. 31, 1930. [10]

[Title of Court and Cause.]

MOTION FOR ORDER ALLOWING TEMPORARY INJUNCTION.

Comes now the above-named plaintiff, by and through its attorneys, Messrs. John A. Clark and Charles E. Taylor, and moves the court for an order requiring the above-named defendant Ralph Wien to be and appear before this court, at a date to be set by the court, then and there to show cause, if any he has, why a temporary restraining order should not be issued to restrain the said defendant Ralph Wien, during the pendency of this action, from engaging in any business, occupation or employment as aviator, pilot of airplanes or other aircraft or in any other manner engaging in the airways transportation business for hire, either for

himself or for or in behalf of any other person or persons whomsoever.

Dated, Fairbanks, Alaska, February 4, 1930.

JOHN A. CLARK,
CHAS. E. TAYLOR,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 4, 1930. [11]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Upon reading the complaint on file in the above-entitled action, together with the affidavit of Charles L. Thompson, and the motion of John A. Clark and Charles E. Taylor, attorneys for the plaintiff, for an order requiring the above-named defendant Ralph Wien to show cause, if any he has, why he should not be enjoined and restrained, during the pendency of this action and until the termination thereof, from in any way acting as pilot or otherwise operating any airplane or other aircraft for hire, either for himself or for or in behalf of any other person or persons whomsoever,—

Now, therefore, the Court being fully advised, IT IS ORDERED AND ADJUDGED, that the said defendant, Ralph Wien, be and appear before this court on Saturday the 8th day of Febru-

two

ary, 1930, at the hour of ~~ten~~ o'clock of said day, or

as soon thereafter as counsel can be heard, then and there to show cause, if any he has, why a temporary restraining order should not be issued by this court, enjoining and restraining the said defendant Ralph Wien from acting as pilot or aviator, or in any manner operating airplanes or other aircraft for hire, either for himself or for any other person or persons whomsoever or to do anything whatsoever that will in any manner conflict with the business of the plaintiff herein, during the pendency of this action.

Dated, Fairbanks, Alaska, February 4, 1930.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 17, page 637.

[Endorsed]: Filed Feb. 4, 1930. [12]

[Title of Court and Cause.]

MARSHAL'S RETURN ON CERTIFIED COPY OF ORDER TO SHOW CAUSE WITH MOTION AND AFFIDAVIT.

I, Lynn Smith, United States Marshal for the Territory of Alaska, Fourth Division, do hereby certify and return that I received a certified copy of motion with affidavit and order to show cause in the above-entitled case at Fairbanks, Alaska, on the 4th day of February, 1930, and that thereafter on the same day I delivered the said certified copy of motion with affidavit and order to show cause to

the defendant Ralph Wien, personally, at Fairbanks, Alaska.

Dated at Fairbanks, Alaska, this 5th day of February, 1930.

LYNN SMITH,
U. S. Marshal.
By PAT O'CONNOR,
Deputy.

[Endorsed]: Filed Feb. 5, 1930. [13]

[Title of Cause.]

ORDER RESETTING HEARING ON PLAINTIFF'S ORDER TO SHOW CAUSE.

Now on this day, on motion of Harry E. Pratt, Esq., of counsel for defendant, Chas. E. Taylor, Esq., of counsel for plaintiff, being present and consenting thereto,—

IT IS ORDERED that the hearing on plaintiff's order to show cause be, and is hereby reset for 2:00 o'clock P. M. of Monday, February 10, 1930.

Entered in Court Journal No. 17, page 648.

[Endorsed]: Feb. 7, 1930. [14]

[Title of Cause.]

ORDER RESETTING HEARING ON PLAINTIFF'S ORDER TO SHOW CAUSE.

Now on this day, on motion of Chas. E. Taylor, Esq., of counsel for plaintiff, Louis K. Pratt, Esq., of counsel for defendant, being present and consenting thereto,—

IT IS ORDERED that the hearing on plaintiff's order to show cause be, and is hereby reset for 3:00 o'clock P. M. of this 10th day of February, 1930.

Entered in Court Journal No. 17, page 658.

[Endorsed]: Feb. 10, 1930. [15]

[Title of Cause.]

HEARING ON PLAINTIFF'S ORDER TO SHOW CAUSE.

Now on this day this cause came on regularly for hearing on plaintiff's order to show cause why temporary injunction should not be issued restraining defendant, the plaintiff appearing by and through Chas. E. Taylor, Esq., the defendant being present in person and with his counsel Louis K. Pratt and Harry E. Pratt, Esq.

Argument to the Court was had by Chas. E. Taylor, Esq., for and in behalf of the plaintiff, and by Harry E. Pratt, Esq., for and in behalf of the

defendant, and at 5:30 P. M. the Court tentatively continued the hearing until 10:00 o'clock A. M. of Tuesday, February 11, 1930.

Entered in Court Journal No. 17, page 658.

[Endorsed]: Feb. 10, 1930. [16]

[Title of Cause.]

ORDER CONTINUING HEARING.

Now at this time on the Court's own motion, IT IS ORDERED that the hearing tentatively set for 10:00 o'clock A. M. of this 11th day of February, 1930, be and is hereby continued until 7:30 P. M. of said day.

Entered in Court Journal No. 17, page 664.

[Endorsed]: Feb. 11, 1930. [17]

[Title of Cause.]

HEARING ON PLAINTIFF'S ORDER TO SHOW CAUSE (CONTINUED).

Now on this day this cause came on regularly for hearing on plaintiff's order to show cause why temporary injunction should not be issued restraining defendant, the plaintiff appearing by and through Chas. E. Taylor, Esq., the defendant being present in person and with his counsel Louis K. Pratt, Esq., and Harry E. Pratt, Esq.

Argument to the Court was had by respective counsel, whereupon the Court stated the matter would be taken under advisement and decision rendered at a subsequent date.

Entered in Court Journal No. 17, page 664.

[Endorsed]: Feb. 11, 1930. [18]

[Title of Cause.]

ORDER GRANTING PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION.

And now came Chas. E. Taylor, Esq., counsel for plaintiff, came Louis K. Pratt, Esq., and Harry E. Pratt, Esq., counsel for defendant, and the Court having heretofore and on the 11th day of February, 1930, heard the arguments of counsel on plaintiff's motion for a temporary injunction and taken the matter under advisement and now being fully and duly advised in the premises,—

IT IS ORDERED that the plaintiff's motion for a temporary injunction be and is hereby granted and the bond fixed in the sum of Twelve Hundred Dollars ($1,200.00).

Entered in Court Journal No. 17, page 689.

[Endorsed]: Feb. 24, 1930. [19]

[Title of Court and Cause.]

TEMPORARY INJUNCTION.

This cause having been brought on regularly for hearing on the 12th and 13th days of February, 1930, upon the motion of the above-named plaintiff for an order of this Court enjoining and restraining the defendant Ralph Wien, during the pendency of this action, from engaging in the occupation of aviation or of any business pertaining thereto which would in any way compete or interfere with the business of the plaintiff, plaintiff appearing by its attorneys Messrs. John A. Clark and Charles E. Taylor, and the defendant appearing by his attorneys, Messrs. Harry E. Pratt and Louis K. Pratt.

And the Court having read the complaint and affidavit filed by the plaintiff and the counter-affidavit filed by the defendant, and having heard and considered the arguments of respective counsel, and being fully advised in the premises,—

IT IS ORDERED AND ADJUDGED AND DECREED that the defendant Ralph Wien be enjoined and restrained during the pendency of this action and until the final determination thereof from entering into competition in any way with the plaintiff in the conduct of its airplane business in the Second, Third, and Fourth Judicial Divisions of Alaska, and from entering into any business that will conflict in any way with the plaintiff in the conduct of its airplane business in said Divisions of Alaska, and from becoming interested in any

corporation or [20] copartnership engaged in said divisions in the airplane business, and from accepting employment with any airplane company, corporation or association, except the plaintiff company, as pilot, mechanic or manager in the aforesaid Divisions of Alaska, which said restraints and injunctions against the defendant shall continue until the final determination of this action.

IT IS FURTHER ORDERED AND ADJUDGED that this order shall become effective and operative upon the filing, by the plaintiff, of the statutory undertaking in the sum of Twelve Hundred Dollars ($1,200.00), to be approved by this Court.

Dated at Fairbanks, Alaska, this 25th day of February, 1930.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 17, page 692.

[Endorsed]: Filed Feb. 25, 1930. [21]

[Title of Court and Cause.]

UNDERTAKING FOR TEMPORARY INJUNCTION.

WHEREAS, in the above-entitled action, the above-named plaintiff applied for a temporary injunction to restrain the defendant Ralph Wien from entering into any business or employment with any person or persons that will in any way

conflict or interfere with the plaintiff in the conduct of its airplane business in the Territory of Alaska; and

WHEREAS, after hearing such application, the above court, on the 24th day of February, 1930, granted a temporary injunction in this action, enjoining and restraining the said defendant Ralph Wien from entering into competition with the plaintiff in the conduct of its airplane business in the Second, Third and Fourth Judicial Divisions of Alaska, and from entering into any business that will conflict in any way with the conduct of such business of plaintiff, and from becoming interested in any company or partnership engaged in the said divisions in the airplane business, and from accepting any employment with any airplane company, corporation or association, except the plaintiff company, as pilot, mechanic or manager in said Divisions of Alaska, which said temporary injunction was to take effect and become operative upon the filing by plaintiff of an undertaking as provided by statute, in the sum of Twelve Hundred Dollars ($1200.00) to be approved by the Court, and to continue and remain in operation until the final determination of this action,— [22]

Now, therefore, we, the Alaskan Airways, Inc., a corporation, as principal, and the National Surety Company, a corporation as surety, in consideration of the premises, and of the issuing of said temporary injunction, do hereby jointly and severally undertake and promise that they will pay all costs and disbursements that may be decreed to the defend-

ant, Ralph Wien, and such damage that he may sustain by reason of said temporary injunction, if the same be wrongful or without sufficient cause, not exceeding said sum of Twelve Hundred Dollars ($1200.00).

Dated, Fairbanks, Alaska, February 26th, 1930.

ALASKAN AIRWAYS INC.
By ARTHUR W. JOHNSON,
Manager.

NATIONAL SURETY COMPANY.
By CHAS. E. TAYLOR, (Seal)
Attorney-in-fact.

United States of America,
Territory of Alaska,
Fourth Judicial Division,—ss.

Chas. E. Taylor, being first duly sworn, on oath, says: I am the duly authorized agent of the National Surety Company *Company,* a corporation, the surety on the foregoing bond. That to the best of my knowledge and belief the said company has complied with the provisions of Chapter 52, Session Laws of Alaska, 1915, and the laws of the United States and of the Territory of Alaska, with reference to surety companies and corporations and that the said Surety Company is fully authorized to do business within the Territory of Alaska, and is worth more than the sum of Twelve Hundred Dollars over and above all its just debts and liabilities in property not exempt from execution.

CHAS. E. TAYLOR.

Subscribed and sworn to before me this 26th day of February, A. D. 1930.

[Seal] J. G. RIVERS,
Notary Public in and for Alaska.

My commission expires 2/18/34.

The foregoing bond approved this Feb. 26th, 1930.

CECIL H. CLEGG,
District Judge.

Filed Feb. 26, 1930. [23]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 12th day of February, 1930, this cause came on to be heard by the Court on plaintiff's motion for a rule to show cause and on a rule to show cause on the part of the defendant why a temporary injuction should not be issued against him in this cause. The plaintiff appeared by Charles E. Taylor, one of its attorneys of record, and the defendant in person and by Harry E. Pratt and Louis K. Pratt, his attorneys.

On behalf of the plaintiff the said Charles E. Taylor, its attorney, read the complaint, motion and rule to show cause and the supporting affidavit of Charles L. Thompson and also the affidavit of defendant, Ralph Wien, entitled "Resistance to Motion to Show Cause," and in that connection it was stipulated between the attorneys for the plain-

tiff and the defendant that the portion of the affidavit of Ralph Wien on file in this cause and entitled "Resistance to Motion to Show Cause" which set forth in effect that the contract forming the basis for the cause of action [24] in this cause was entered into by the plaintiff for the purpose and with the effect of creating a monopoly of the airplane business in Alaska, and especially in the Interior of Alaska, should be deemed denied by plaintiff to the same effect as if such denial of such portion had been made in writing by proper affidavit. At the close of the showing on behalf of the plaintiff the defendant submitted the affidavit of Ralph Wien, the defendant, of date February 10th, 1930, entitled "Resistance to Motion to Show Cause." The hearing on the motion was concluded on February 13, 1930, and all of the evidence seen and heard by the Court was the said complaint, the affidavit of Charles L. Thompson, the said affidavit of defendant, Ralph Wien, and the denial by plaintiff of the monopoly statements made by the said Ralph Wien in his affidavit.

The affidavit of Charles L. Thompson (omitting caption and title) was as follows:

AFFIDAVIT OF CHARLES L. THOMPSON.

"CHARLES L. THOMPSON, being first duly sworn upon his oath, deposes and says:

I am the duly authorized agent of the Alaskan Airways Inc., a corporation, duly organized and existing under and by virtue of the laws of the

State of Delaware, engaged in and carrying on a general airways and aerial transportation business in Alaska, and that I am the manager of said Company at Fairbanks, Alaska, and make this affidavit for and in its behalf.

That on or about the 6th day of August, 1929, at Fairbanks, Alaska, the said Alaskan Airways Inc., purchased all of the right, title and interest of the above-named defendant, Ralph Wien, in and to the Wien Alaska Airways Company, a corporation then and there existing and carrying on a general airways transportation business in Alaska, such [25] purchase including all of the property and goodwill of the said corporation and of its stockholders, including the said defendant Ralph Wien who was then and there a stockholder and employee of said company.

That as part of the consideration for said purchase price, the said Wien corporation, and all of its stockholders, including the said Ralph Wien, covenanted, promised and agreed, individually and collectively, that, for a period of three years, commencing on said 6th day of August, 1929, they—including the said Ralph Wien would not engage in any business or accept any employment with any firm, person or corporation that would in any way interfere with or compete with the business of the Alaskan Airways Inc., to wit: that of airways transportation of freight or passengers for hire.

That notwithstanding such covenants, agreements and promises of the said Ralph Wien, he, the said Ralph Wien, on or about the 10th day of Janu-

ary, 1930, accepted employment and associated himself with one Percy Hubbard and one Arthur Hines, copartners engaged in the business of motor and airway transportation at Fairbanks, Alaska, and engaged in carrying passengers and freight by airplane from Fairbanks to other points in Alaska, for hire, which said business is in direct competition and interference with the business of said Alaskan Airways Company.

That immediately upon the acceptance of the said employment by the said Ralph Wien, he, the said Wien was notified by the said Alaskan Airways Inc., of his violation of his said promises and covenants, but the said Ralph Wien utterly disregarded said notice and continued in said employment and still continues therein, and will, unless enjoined [26] and restrained by this Court, continue to act as aviator and pilot and operate airplanes between points in the Territory of Alaska, for the said Hubbard and Hines, in competition with the said Alaskan Airways, Inc., and in violation of said agreements and covenants, and the said Alaskan Airways, Inc., will be irreparably damaged by reason thereof.

That on or about the first day of February, 1930, the above-entitled action was instituted in the above Court and summons and a copy of the complaint duly served upon the said Ralph Wien, to which complaint reference is hereby made for more particulars of the said purchase and of the promises and agreements of the said Ralph Wien in the premises.

That the said Ralph Wien is not financially able to respond in damages that may be adjudged against him by this Court by reason of his said actions, and that the plaintiff herein has no plain, speedy or adequate remedy at law, and that until the final hearing of this cause the said defendant Ralph Wien should be enjoined and restrained from continuing to in any manner operate or pilot any planes or other aircraft for hire, either for himself or for any other person or persons whomsoever."

The affidavit of defendant Ralph Wien (omitting caption) was as follows:

AFFIDAVIT OF RALPH WIEN.

RESISTANCE TO MOTION TO SHOW CAUSE.

United States of America,
Territory of Alaska,—ss. [27]

Ralph Wien, being first duly sworn on oath says: I am the defendant above named; the above-named plaintiff, as shown by its articles of incorporation on file in the office of the Clerk of this court, was organized under the laws of the State of Delaware in the month of June, 1929; that one of the objects of its organization was to transport passengers and freight for hire as a common carrier from one point to another within the Territory of Alaska, and to and from points within the Territory of Alaska and the States and foreign countries; that the office and principal place of business of said

plaintiff within the Territory of Alaska, is in the Town of Fairbanks, Alaska, Division aforesaid; that said plaintiff filed a copy of its charter or articles of incorporation, its designation of an agent upon whom service of process in Alaska might be made, and its financial statement in the office of the Clerk of the District Court for the aforesaid Division on the 12th day of September, 1929, and not before, and it filed a copy of its charter or articles of incorporation, financial statement and designation of agent in the office of the Auditor of the Territory of Alaska on the 22d day of October, 1929, and not before; that said plaintiff paid the corporation tax and other fees required by law of foreign corporations doing business within Alaska on the 22d day of October, 1929, and not before.

That upon the 1st day of August, 1929, said plaintiff purchased all of the property, goodwill and business of the Bennett-Rodebaugh Airplane Company, a corporation doing a general business as common carrier through the air in the transportation of passengers and freight within the Territory of Alaska and between Alaska and points in Canada and Siberia, and between the 1st day of August and the 6th day of August, 1929, and at all times thereafter the said plaintiff was [28] engaged as a common carrier in doing an airplane business transporting passengers and freight by air from one point to another within the Territory of Alaska and said plaintiff continued at all times after the 1st day of August, 1929, to do a general airplane business transporting pas-

sengers and freight in Territorial and foreign commerce; that at all times after the 1st day of August, 1929, the said plaintiff held itself out to the general public as being a common carrier in the business of transporting passengers and freight by air from point to point in Alaska and to and from points in foreign countries and Alaska and during said period, from August 1st to August 6th, 1929, did in fact as a common carrier transport passengers and freight for hire from point to point within the Territory of Alaska, and did in fact do a general transportation business by airplane within the Territory of Alaska, between the 1st and 6th days of August, 1929, and at all times thereafter.

That upon the 6th day of August, 1929, the Wien Alaska Airways Incorporated was a corporation organized under the laws of the Territory of Alaska and engaged as a common carrier in carrying passengers and freight for hire from point to point within the Territory of Alaska and from points in Alaska to and from Siberia and Canada.

That at the time the contract set forth in plaintiff's complaint was entered into the said plaintiff had already purchased the property and business of the Bennett-Rodebaugh Airplane Company, and had already arranged to purchase the property and business of the Anchorage Air Transport Incorporated, a corporation, a common carrier engaged in transporting by airplane passengers and freight within the Territory of Alaska, and especially within the Third, Fourth and Second Divisions of Alaska; that the only transportation [29] by air

within the Third, Fourth and Second Division of the Territory of Alaska, upon the 5th day of August, 1929, and thereabouts was that furnished by the aforesaid Anchorage Air Transport Incorporated, Alaska Airways Incorporated and Wien Alaska Airways Incorporated.

That the said plaintiff purchased the said Bennett-Rodebaugh Airplane Company and entered into the contract set forth in plaintiff's complaint and purchased the business, goodwill and property of the said Anchorage Air Transport Incorporated during the month of August, 1929, pursuant to a general plan to purchase all of said companies and to thereby eliminate all competition and create a monopoly in itself, and in purchasing the property, business and goodwill of said Bennett-Rodebaugh Airplane Company and the Anchorage Air Transport Incorporated entered into contracts with them and their stockholders to the same effect and purpose as that entered into with Wien Alaska Airways Incorporated which is set forth in plaintiff's complaint, in fact the contracts entered into between the plaintiff and the aforesaid Bennett-Rodebaugh Airplane Company and Anchorage Air Transport Incorporated were identical with the contract set forth in plaintiff's complaint with the exception of the necessary change of names and the dates.

That at the time of the execution of said contract of August 6th, 1929, Exhibit 'A' of plaintiff's complaint, all of the stock of the Wien Alaska Airways Incorporated was owned and held by the sign-

ers of said agreement, to wit, Noel Wien, G. R. Jackson and affiant, and the effect of said contract, Exhibit 'A,' was to transfer all of said stock to plaintiff, and affiant and his co-owners aforesaid immediately after executing said contract of August 6th, [30] 1929, met and dissolved said Wien Alaska Airways Incorporated, according to the laws of Alaska relating thereto, to wit, Section 23, Chapter 73 Session Laws of Alaska, 1923.

That this affiant is financially responsible and able to respond to any judgment for damages that might be obtained against him; that said contract of August 6th, 1929, Plaintiff's Exhibit 'A' in its complaint, was made in Alaska, with residents of the Territory of Alaska and the same is void.

RALPH WIEN.

Subscribed and sworn to before me this 10th day of February, 1930.

HARRY E. PRATT,

Notary Public in and for the Territory of Alaska.

My commission expires Aug. 9, 1930.

The law and the facts of the case were argued by the attorneys for the parties respectively, and at the conclusion thereof on the 13th day of February, 1930, the Court took the case under advisement, and afterwards and on the 24th day of February, 1930, sustained the said motion, granted said temporary injunction and at that time filed a written "Memorandum Opinion on Motion for Temporary Injunction" in words and figures as follows:

In the District Court for the Territory of Alaska,
Fourth Judicial Division.

No. 3274.

ALASKAN AIRWAYS INC., a Corporation,
Plaintiff,

vs.

RALPH WIEN,
Defendant.

MEMORANDUM OPINION ON MOTION FOR TEMPORARY INJUNCTION.

Suit in equity to enforce the provisions of a contract [31] entered into between plaintiff and defendant and others in which permanent injunction is main relief sought to restrain acts of defendant in violation of covenants to the effect that he would refrain from engaging in competitive business for the period of three years in Alaska. Order to show cause was issued and on return day hearing was had.

No fair understanding can be had of the novel controversy presented on the hearing of this motion without setting out the complaint and supporting affidavit in behalf of plaintiff and the affidavit of defendant Wien entitled "Resistance to Motion to Show Cause."

The complaint is as follows:

(The complaint copied in said opinion is omitted because a part of the record proper.)

Plaintiff's supporting affidavit is by its local manager, Charles L. Thompson, as follows:

(The affidavit of Chas. L. Thompson copied into the opinion is omitted because already a part of this bill of exceptions.)

Defendant's showing in opposition to granting the motion is made by the affidavit of the defendant Ralph Wien in the document entitled "Resistance to Motion to Show Cause" as follows:

(The affidavit of Ralph Wien is omitted as a part of the opinion for the reason that it is already incorporated in this bill of exceptions.)

It was stipulated on the hearing by the attorneys for the respective parties that that portion of the affidavit of Wien referring to the existence of an alleged monopoly might be considered as denied by the plaintiff without the filing of a formal denial. [32]

These papers constitute everything filed before the Court on this hearing except the briefs of counsel. There was no oral testimony.

JOHN A. CLARK and CHARLES E. TAYLOR, of Fairbanks, Alaska, Attorneys for Plaintiff.

HARRY E. PRATT and LOUIS K. PRATT, of Fairbanks, Alaska, Attorneys for Defendant.

CLEGG, J.—It will be observed from the foregoing that no formal answer has been filed by the defendant; that the complaint and supporting affidavit by Thompson is wholly undenied and uncontradicted by defendant's affidavit entitled "Resistance to Motion to Show Cause"; that the contract sued

upon is not attacked as to the competency of parties, execution, consideration, terms and language, nor assailed for fraud, coercion, mistake, or undue influence, or that the subject of the contract is not lawful; that the attempted defense in defendant's affidavit entitled "Resistance to Motion to Show Cause" might be set up as a defense to the main action and become one of the ultimate issues in the case on trial and that it falls far short in its allegations of fact to challenge the attention of a court of equity in the face of the rights and equities existing on behalf of the plaintiff from the allegations of the complaint and supporting affidavit. The entire resistance attempts to set up new and collateral facts in no way suggested or inspired by plaintiff's showing which undeniably entitles plaintiff to the relief now sought.

It is the contention of the defendant in his showing, in substance, as follows:

That on the 6th day of August, 1929, when the contract [33] sued upon was executed, the plaintiff, being a foreign corporation, did not file a copy of its charter, articles of incorporation, financial statement and designation of an agent upon whom service of process in Alaska might be made in the office of the Clerk of the District Court of the Fourth Judicial Division of Alaska until the 12th day of September, 1929.

That the office of said plaintiff and the principal place of its business in Alaska was the town of Fairbanks, Alaska.

That it did not file its charter or articles of incorporation, financial statement and designation of agent in the office of the auditor of the Territory until the 22d day of October, 1929.

That it did not pay the statutory corporation tax and other fees required by the laws of the Territory until the 22d day of October, 1929; and

That between the 1st day of August, 1929, and the 6th day of August, 1929,—

> "* * * the plaintiff was engaged as a common carrier in doing an airplane business transporting passengers and freight by air from one point to another within the Territory of Alaska and said plaintiff continued at all times after the 1st day of August, 1929, to do a general airplane business transporting passengers and freight in Territorial and foreign commerce; that at all times after the 1st day of August, 1929, the said plaintiff held itself out to the general public as being a common carrier in the business of transporting passengers and freight by air from point to point in Alaska and to and from points in foreign countries and Alaska and during said period, from August 1st to August 6th, 1929, did in fact as a common carrier [34] transport passengers and freight for hire from point to point within the Territory of Alaska, and did in fact do a general transportation business by airplanes within the Territory of Alaska, between the 1st and 6th days of August, 1929, and at all times thereafter."

These allegations must stand the test to which oral testimony would be subjected, and, examining them with reference to the filing of documents required by the law, the Court accepts judicially as a fact that the plaintiff did not file a copy of its charter, articles of incorporation, financial statement, or its designation of an agent on whom process might be served in the office of the Clerk of the District Court of the Fourth Division of Alaska until the 12th day of September, 1929; but the Court cannot accept, even if uncontradicted, the statement that the plaintiff did not file a copy of its charter, or articles of incorporation, or financial statements, or designation of agent in the office of the Auditor of the Territory of Alaska until the 22d day of October, 1929, nor the statement that plaintiff paid the corporation tax and other fees required by law of foreign corporations doing business in Alaska only upon the 22d day of October, 1929. This is not even secondary, but, at most, hearsay testimony.

Section 1872 of the Compiled Laws of Alaska provides as follows:

> "Sec. 1872. A judicial, legislative, or executive record of said District, or of any State or Territory of the United States, or of any foreign country, or of any political subdivision of either, may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof, with the seal of the court or the official seal of such [35] person affixed thereto, if it or he have a seal, or otherwise authenticated as

required by sections nine hundred and five, nine hundred and six, and nine hundred and seven of the Revised Statutes of the United States."

Without quoting them, Sections 654, 655, 657, and 660 as amended by Chapter 32 of the Session Laws of Alaska, 1923, contain a statement of the law governing foreign corporations doing business in Alaska, and the latter section as amended prescribed the penalty for noncompliance therewith, saying, in effect, that all contracts made by a noncomplying corporation or company with residents of the Territory which are made in the Territory shall be void as to the corporation or company, and no Court of the Territory shall enforce the same in favor of the corporation or company. It is contended that the plaintiff company failed in complying with the prescribed laws in this regard, and that, therefore, the contract sued upon, which it is admitted was made in the Territory with a resident of the Territory, is void.

On this preliminary hearing, even if the best evidence were presented showing, or tending to show, that the contract sued upon was void under these sections and the facts, the Court will not now enter into a consideration or determination of this question which may become one of the final issues in the case, especially where the same is not tendered to the Court by a formal answer verified as required by law. The Court will be content to preserve the status of the parties as fixed by the terms of the contract pending a final hearing on the merits.

The rules by which the Court and parties will now be governed may be briefly stated:

> "As a general rule, where an injury committed by one [36] against another is continuous or is being constantly repeated, so that complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and the injury will be prevented by injunction." 32 C. J., sec. 36, p. 56.
>
> "An injunction *pendente lite* should not usurp the place of a final decree, neither should it reach out any further than is absolutely necessary to protect the rights and property of the petitioner from injuries which are not only irreparable, but which must be expected before the suit can be heard on its merits. Only those issues will be determined which are necessary factors in granting or denying a temporary restraining order. It is not necessary that the complainant's rights be clearly established, or that the Court find complainant is entitled to prevail on the final hearing. It is sufficient if it appears that there is a real and substantial question between the parties, proper to be investigated in a court of equity, and in order to prevent irremed*ial* injury to the complainant, before his claims can be investigated, it is necessary to prohibit any change in the conditions and relations of the property and of the parties during the litigation."

The latter statement is by District Judge Farrington in the case of Goldfield Consol. Mines Co.

vs. Goldfield Miners' Union No. 220 et al., 159 Fed. 511, 512, citing 22 Cyc. 822; 6 Pomeroy's Eq. Juris. 621; Harriman vs. Northern Securities Co. (C. C.) 132 Fed. 464, 485.

Spelling on Injunctions (2d ed.), Vol. 1, page 13, states the rule as follows:

> "It is a rule of courts in issuing a temporary injunction, that they will in no manner anticipate the ultimate result of the questions of right involved. It is sufficient, for the purpose of granting the writ, that a [37] case has been made out warranting interference for the preservation of the property or rights in issue *in statu quo,* until final hearing upon the merits. It is neither usual nor necessary, at this state of the proceedings, to express or even to have the means of forming an opinion on the merits of the principal matter at issue; nor, generally, does it defeat the rights acquired under an interlocutory injunction that complainant should not prevail upon the trial of the merits, or should fail to present such a case as will entitle him to a perpetual injunction upon the final hearing. He may be entitled to temporary relief, although his right to the relief prayed may ultimately fail."

Further, at Section 487, page 412, this author again says:

> "One of the most frequent cases calling for preventive relief is where parties seek to restrain the violation of provisions in contracts

for not engaging in a particular kind of business, or not setting up in business * * * . Such provisions are designated by the general term of negative stipulations, and will be enforced by injunction when reasonable and not in illegal restraint of trade."

High on Injunctions (2d ed.), Vol. 1, sec. 8, page 8, states the rule as follows:

"Where, however, the parties are at issue upon a question of legal right and it is necessary to preserve their rights *in statu quo* until the determination of the controversy, an interlocutory injunction may properly be allowed. In such cases courts of equity do not assume jurisdiction to dispose of the legal rights in controversy, but confine themselves to protecting those rights as they then are, pending an adjudication upon the legal questions involved." [38]

Section 5, page 5, of the same work reads:

"It is to be constantly borne in mind that in granting temporary relief by interlocutory injunction, courts of equity in no manner anticipate the ultimate determination of the questions of right involved. They merely recognize that a sufficient case has been made out to warrant the preservation of the property or rights in issue *in statu quo* until a hearing upon the merits, without expressing, and indeed without having the means of forming an opinion as to such rights. And in order to sustain an in-

junction for the protection of property *pendente lite* it is not necessary to decide in favor of complainant upon the merits, nor is it necessary that he should present such a case as will certainly entitle him to a decree upon the final hearing, since he may be entitled to an interlocutory injunction, although his right to the relief prayed may ultimately fail."

Examining the statements in defendant's showing of resistance to the motion with reference to plaintiff's alleged engaging in business in Alaska prior to the 6th day of August, 1929, and subsequent thereto up to the 22d day of October, 1929, which are seriously claimed to be admitted by the plaintiff, there is found not a single fact alleged by defendant on the subject that the plaintiff did so engage in business within the meaning of the provisions of our statute heretofore cited prescribing the requirements to be followed by foreign corporations doing business in Alaska. It is said that the plaintiff "engaged as a common carrier in doing an airplane business transporting passengers and freight by air from one point to another" and so on.

This is a mere conclusion and states no fact enabling the Court to say what specific alleged act or acts of the [39] plaintiff justifies the conclusion that the plaintiff at any time was doing business anywhere in the Territory within the meaning of the applicable statutes. What particular act did plaintiff do? Whom did plaintiff transport by air for hire, and when? Where did such alleged transportation take place? What alleged freight was car-

ried, and when and where? What were the terms of such alleged contracts of hiring? Was anything of value paid by anybody for the alleged services and when? Did the plaintiff authorize such transportation?

It is further said that the plaintiff "held itself out to the general public as being a common carrier in the business of transporting passengers and freight by air from point to point in Alaska," and the Court asks similar questions with reference to this conclusion of law.

It is further said that the plaintiff "did in fact as a common carrier transport passengers and freight for hire." Did the plaintiff transport the passengers and freight by airplanes or otherwise?

It is further said that the plaintiff "did in fact do a general transportation business by airplanes within the Territory of Alaska, between the 1st and 6th days of August, 1929, and at all times thereafter." What did the plaintiff do? What acts did plaintiff commit in violation of the provisions of existing law?

Leaving this phase of defendant's showing, it is further alleged, in substance and effect, that the plaintiff not only entered into the contract sued upon but also other contracts with the following companies: Bennett-Rodebaugh Airplane Company and Anchorage Air Transport Incorporated. It is alleged that such contracts with these companies and [40] their stockholders were

> " * * * to the same effect and purpose as that entered into with Wien Alaska Air-

ways Incorporated which is set forth in plaintiff's complaint * * * with the exception of the necessary change of names and the dates."

Who is it who assumes to say that these other contracts were to the same effect and purpose as the contract involved in this suit? Is the Court to take the statement of an airplane pilot or mechanic or sometimes manager of an airplane corporation, who is also the defendant in this suit, as to the character of these alleged other and undisclosed contracts, as to their purpose and effect, and as to the fact that they are, or either of them is, identical with the contract in this suit?

The Court now will cease discussing contentions so unfounded and extravagant and claims so preposterous and will conclude by saying that if ever again mature and experienced attorneys inveigle this Court into witnessing and deciding a sham battle of this character laid on fictitious lines while the Court is engaged in other more exacting duties, the Court will be compelled to deal summarily with them and each of them.

Motion is granted, but it will be limited to restraining the defendant from entering into competition in any way with the plaintiff in the conduct of its airplane business in the Second, Third and Fourth Judicial Divisions of Alaska, and from entering into any business that will conflict in any way with the plaintiff in the conduct of its airplane business in said Divisions of Alaska, and from becoming interested in any company or co-

partnership engaged in said divisions in the airplane business, and from accepting employment with any airplane [41] company, corporation, or association, except the plaintiff company, as pilot, mechanic or manager in said Divisions of Alaska, and such restraints and injunctions against the defendant shall continue until the final determination of this action, and become operative upon the filing of the statutory undertaking in the sum of Twelve Hundred Dollars ($1200.00) approved by the Court.

Dated at Fairbanks, Alaska, this 24th day of February, 1930.

CECIL H. CLEGG,
District Judge.

Received a copy of the foregoing bill of exceptions on this 1st day of March, 1930.

JOHN A. CLARK,
CHAS. E. TAYLOR,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 3, 1930.
Refiled Mar. 15, 1930. [42]

The following are Plaintiff's Citations:

Chap. 69 Session Laws of Alaska, 1923, amend. Sec. 654 Comp. L. Alaska.

Chap. 32 Alaska Session Laws amend. Sec. 660 Comp. L. Alaska.

Sec. 657, Comp. L. Alaska.

14a C. J. 1273, Sec. 3979.

14a C. J. 1305, Sec. 4008.

14a C. J. 540, Sec. 2460.

14a C. J. 1276, Sec. 3982 and n.
14a C. J. 1279, Sec. 3986 and n.
14a C. J. 1280, Sec. 3989 and n.
14a C. J. 1276, Sec. 3982.
14a C. J. 1324, Sec. 4031 and n.
32 Fed. (2d), 519.
14a C. J. 1324, Sec. 4031.
87 Pac. 1143.
83 Pac. 734.
1 Alaska 598.
22 Fed. 694.
81 Fed. 44.
41 So. 678.
180 S. W. 811.
101 S. W. 702.
83 At. 807.
41 Fed. 678.
44 So. 591.
264 Pac. 206.
13 C. J. 467, Sec. 410, 411.
46 L. R. A. 122.
43 Pac. 667.
35 L. R. A. (N. S.) 396 and Notes.
7 R. C. L. 571, Sec. 559.
37 Cal. 543.
Title 15 U. S. C. A., pages 30, 33, 34, 68.
221 U. S. 1, 55 L. Ed. 619.
19 R. C. L. 67.
3 R. C. L. Supp. 913.
2 R. C. L. Supp. 1523.
12 R. C. L. 984.
28 C. J. 743, Sec. 19.

140 Fed. 412.
140 Fed. 987, 72 C. C. A. 681.
186 Fed. 63, 108 C. C. A. 165.
227 Pa. 55, 75 At. 988.
200 U. S. 179, 50 L. Ed. 428.
171 U. S. 604, 43 L. Ed. 300.
171 U. S. 578, 43 L. Ed. 290.
12 C. J. 23, Sec. 23.
6 R. C. L. 591.
278 Fed. 167, citing Sec. 6708 Thompson on Corporations.
33 A. L. R. 351–2.
3 L. A. R. 248 (Anno. p. 250).
52 L. A. R. 1344.
52 L. A. R. 1356 (Anno. p. 1362).
9th L. A. R. 1472.
20th L. A. R. 66.
22 L. A. R. 744.
278 Fed. 699.
7 Alaska 375.
99 Pac. 1049.
125 N. E. 67.

The following are Defendant's Citations:

14a C. J. 1254 (n. 53–56).
Sec. 660 Comp. L. Alaska as amended by Session Laws of Alaska, 1923, Chap. 32.
14a C. J. 1294 (n. 82–85) Sec. 4002.
14a C. J. 1302.
14a C. J. 1305, Sec. 4008.
14a C. J. 1307.
3 Alas. 649.

6 Alas. 358.
7 Alas. 375.
99 Pac. 1049.
278 Fed. 699.
13 C. J. 478, Sec. 422 and notes Black's Dictionary, p. 451.
91 U. S. 275.
34 Cal. 492.
259 U. S. 214.
284 Fed. 401.
73 Pac. 927.
High on Injunctions, I, Sec. 22.
125 N. E. 67.
168 N. W. 393.
154 Fed. 929.
112 N. W. 989.
149 S. W. 461.
13 C. J. 245 (n. 79, 82, 83).
81 So. 44.
44 So. 591.
200 U. S. 179–185, 50 L. Ed. 428–433.
U. S. Constitution, Art. 4, Sec. 3 (Comp. Laws 24).
Sherman Act, Secs. 1, 2, 3 U. S. Code 351.
Clayton Act, Secs. 1, 18, 7 U. S. Code 352. [43]

[Title of Court and Cause.]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS AND ORDER DIRECTING REFILING OF SAME.

I, Cecil H. Clegg, Judge of said court, do hereby certify that the above and foregoing bill of exceptions, pages numbered 1 to 20 inclusive, contains all of the evidence seen and heard by the Court upon the hearing of plaintiff's motion for a rule to show cause and said rule to show cause, the Court's memorandum opinion and everything occurring at the said hearing not otherwise of record and that it is truthful and accurate.

IT IS THEREFORE ORDERED that the Clerk refile the said bill of exceptions and that when so refiled the same shall be and become a part of the record in this case.

Dated at Fairbanks, Alaska, this 15 day of March, 1930.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 17, page 713.

[Endorsed]: Filed Mar. 15, 1930. [44]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To Rob't W. Taylor, Clerk of Said Court:

You will please prepare a transcript of the

papers and record in the above-entitled cause, authenticate the same in the usual manner and forward by mail to the Clerk of the U. S. C. C. of Appeals at San Francisco, California, for use by said court on the appeal herein, such transcript to contain copies of the following papers and records, to wit:

1. Plaintiff's complaint and exhibit thereto.
2. The motion for an order allowing a temporary injunction.
3. Rule to show cause with marshal's return thereon.
4. Bill of exceptions complete including certificate and order at end.
5. All journal entries including the temporary injunction.

5½. Plaintiff's injunction bond ($1200.00).

6. Praecipe for transcript.
7. All papers on the appeal (except that the citation, order enlarging time to file transcript in Court of Appeals and stipulations as to printing record, [45] are original papers and are to be forwarded to C. C. A. and not made a part of the transcript proper).

HARRY E. PRATT,
LOUIS K. PRATT,
Attorneys for Defendant and Appellant.

Service of the foregoing praecipe for transcript of record by receipt of a copy thereof is hereby admitted this 15th day of March, 1930.

JNO. A. CLARK,
CHAS. E. TAYLOR,
Attorneys for Plaintiff and Appellee.

[Endorsed]: Filed Mar. 15, 1930. [46]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now Ralph Wien, defendant below and appellant, and complains that the judgment and order of the Court granting a temporary injunction against him, entered in the above-entitled cause on the 25th day of February, 1930, is erroneous, contrary to law and unjust to him and files with his petition for an allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, the following assignments of error, upon which he will rely upon said appeal for a reversal, to wit:

I.

The Court erred in making and entering the temporary injunction in this cause of date February 25, 1930, for the following reasons, to wit:

(a) The complaint and affidavits of Charles L. Thompson and Ralph Wien before the Court on the hearing for said temporary injunction, the same constituting the entire evidence in the matter, es-

tablished without dispute that the plaintiff, a foreign corporation, was doing business [47] in the Territory of Alaska prior to and at the time of and at all times after the making of the contract which forms the basis of plaintiff's suit and which was set forth in its complaint as Exhibit "A," and that said contract was made in Alaska with residents of Alaska at a time when said plaintiff had not complied with the laws of Alaska relative to foreign corporations doing business therein in that said corporation filed its articles of incorporation, its financial statement and its designation of an agent upon whom service of process might be made in the office of the Clerk of the District Court for the Division wherein it intended to carry on business, to wit, the Fourth Judical Division, Territory of Alaska, on the 12th day of September, 1929, and not before, and it filed said articles of incorporation, financial statement, designation of agent and paid its corporation tax and other fees required by law in the office of the auditor of the Territory of Alaska upon the 22d day of October, 1929, and not before, and that therefore the contract of August 6, 1929 (Exhibit "A" in plaintiff's complaint), forming the basis of plaintiff's suit was void and could not be enforced in favor of the corporation under the laws of Alaska, to wit: Sections 654, 655 and 660 Compiled Laws of Alaska, as amended by Chapter 69, Session Laws of Alaska, 1923; Chapter 32, Session Laws of Alaska, 1923, and Section 6, subdivision 7, Chapter 118, Session Laws of Alaska, 1929.

(b) The affidavits of Charles L. Thompson and Ralph Wien and the plaintiff's complaint in this cause showed that the contract marked Exhibit "A" in plaintiff's complaint and forming the basis of this suit was invalid as creating a monoply of commerce in freight and passengers in the air by means of airplanes in the Second, Third and Fourth [48] Divisions of the Territory of Alaska and invalid as in restraint of trade, and as also indirectly accomplishing the purchase by plaintiff of the stock of corporations then engaged in the same line of business, all in violation of Section 3 of the Sherman Act (U. S. Code, p. 351) and Sections 1 and 7 of the Clayton Act (U. S. Code, pp. 352 and 353).

HARRY E. PRATT,
LOUIS K. PRATT,
Attorneys for Defendant.

Service of the foregoing assignments of error by receipt of a copy thereof is hereby admitted this 15th day of March, 1930.

JNO. A. CLARK,
CHAS. E. TAYLOR,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 15, 1930. [49]

[Title of Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL.

To the Honorable CECIL H. CLEGG, Judge of Said Court:

The above-named defendant Ralph Wien feeling himself aggrieved by the judgment and order made and entered in the aforesaid cause on the 25th day of February, 1930, wherein the plaintiff was allowed and granted a temporary injunction against him, does hereby pray for the allowance of an appeal from the said judgment and order to the Circuit Court of Appeals for the Ninth Circuit on the grounds specified in his assignment of errors which is filed herewith, that citation be issued as provided by law directing that said appeal be heard at San Francisco, California, fixing the amount of the appeal bond, and ordering that a transcript of the record, proceedings and papers upon which said judgment and order was based, duly authenticated, be sent to the United States Circuit Court of Appeals, city of San Francisco, California. [50]

Dated at Fairbanks, Alaska, this 15th day of March, 1930.

HARRY E. PRATT,
LOUIS K. PRATT,
Attorneys for Defendant.

Service of the foregoing petition is hereby admitted this 15 day of March, 1930.

JOHN A. CLARK,
CHAS. E. TAYLOR,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 15, 1930. [51]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL, FIXING PLACE OF HEARING AND AMOUNT OF APPEAL BOND.

Now, upon this 15th day of March, 1930, this cause came on to be heard upon the petition for an appeal by Ralph Wien, defendant and appellant, and fixing the place of hearing and the amount of the appeal bond, and the Court being fully advised in the premises:

IT IS THEREFORE ORDERED that said appeal be and the same is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the hearing to be had in said city.

IT IS FURTHER ORDERED that a certified transcript of the record, proceedings, orders, judgment and matters upon which said judgment and order appealed from is based by transferred, duly authenticated, to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, and that the appeal bond of the defend-

ant and appellant upon said appeal be fixed at the sum of $250.00 to cover all costs if the appellant fails to make good his plea.

IT IS FURTHER ORDERED that upon said defendant and [52] appellant, Ralph Wien, filing in this cause the aforesaid bond duly approved by this Court, this order shall become effective.

Dated at Fairbanks, Alaska, this 15th day of March, 1930.

CECIL H. CLEGG,
District Judge.

Service of the foregoing order by receipt of a copy thereof is hereby admitted this 15th day of March, 1930.

JNO. A. CLARK,
CHAS. E. TAYLOR,
Attorneys for Plaintiff Below and Appellee.

Entered in Court Journal No. 17, page 714.

[Endorsed]: Filed Mar. 15, 1930. [53]

[Title of Court and Cause.]

COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, Ralph Wien, as principal, and Percy Hubbard and Wm. B. Root, as sureties, are held and firmly bound unto the above-named plaintiff, Alaskan Airways, Inc., a corporation, in the sum of Two Hundred and Fifty Dollars ($250.00), to be

paid the said plaintiff or its successors in interest, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 15th day of March, 1930.

WHEREAS the above-named defendant has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, to reverse the judgment of the above-entitled court in the above-entitled cause rendered on the 25th day of February, 1930, granting a temporary injunction pending final trial of said cause,—

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendant shall prosecute [54] said appeal to effect and pay all costs if he fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

RALPH WIEN,
Principal.
PERCY HUBBARD,
Surety.
WM. B. ROOT,
Surety.

United States of America,
Territory of Alaska,—ss.

Percy Hubbard and Wm. B. Root, being first duly sworn, each for himself and not one for the other, on oath says: I am a resident of Fairbanks Re-

cording District, Territory of Alaska, and am the surety on the foregoing bond; I am worth the sum of five hundred dollars ($500.00) in property situate within the Territory of Alaska over and above my just debts and liabilities and property exempt from execution.

PERCY HUBBARD.
WM. B. ROOT.

Subscribed and sworn to before me this 15th day of March, 1930.

[Seal] HARRY E. PRATT,
Notary Public in and for the Territory of Alaska.

My commission expires Aug. 9, 1930.

The foregoing bond approved by me this 15th day of March, 1930.

CECIL H. CLEGG,
District Judge. [55]

Received copy of foregoing bond this 15 day of March, 1930.

JNO. A. CLARK,
CHAS. E. TAYLOR,
Attys. for Pltf.

[Endorsed]: Filed Mar. 15, 1930. [56]

CITATION ON APPEAL.

United States of America,
Territory of Alaska,
Fourth Judicial Division,—ss.

The President of the United States to Alaskan Airways, Inc., and John A. Clark and Charles E. Taylor, Its Attorneys, GREETING:

YOU ARE HEREBY CITED to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city of San Francisco, State of California, within thirty days from the date of this citation pursuant to an order allowing an appeal entered and made in that certain case in the District Court for the Territory of Alaska, Fourth Judicial Division, No. 3274, wherein Alaskan Airways, Inc., was the plaintiff and Ralph Wien was the defendant, to show cause, if any there be, why the judgment and order rendered in said cause on February 25, 1930, in favor of said plaintiff granting it a temporary injunction against said defendant should not be corrected, set aside and reversed, and why speedy justice should not be done to the said defendant and appellant in that behalf.

WITNESS the Honorable CHARLES EVANS HUGHES, Chief Justice of the Supreme Court of the United States, this 15th day of March, 1930, and

of the Independence of the United States the one hundred and fifty-fourth.

CECIL H. CLEGG,
District Judge.

[Seal] Attest: ROBT. W. TAYLOR,
Clerk of the District Court.

Entered in Court Journal No. 17, page 714.

Service of the foregoing citation, by receipt of a copy thereof, is hereby admitted this 15 day of March, 1930.

JNO. A. CLARK,
CHAS. E. TAYLOR,
Attorneys for Plaintiff and Appellee.

Filed Mar. 15, 1930. [57]

[Title of Court and Cause.]

ORDER ENLARGING TIME TO AND INCLUDING MAY 15, 1930, TO DOCKET CAUSE.

Upon the motion of the attorneys for the said appellant, it appearing to the Court that by reason of the great distance between Fairbanks, Alaska, and San Francisco, California, the uncertainty of mail service between these points and the time required to perfect a record in the above-entitled cause, it is necessary to extend the time for docketing the appeal in said cause,—

IT IS THEREFORE ORDERED that the time within which the said record in this cause shall be deposited and the appeal docketed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be and the same is hereby extended and enlarged up to and including the 15th day of May, 1930.

Dated at Fairbanks, Alaska, March 15th, 1930.

CECIL H. CLEGG,

District Judge, Fourth Division, Territory of Alaska.

Service of the foregoing order by receipt of a copy thereof is hereby admitted this 15 day of March, 1930.

JNO. A. CLARK,
CHAS. E. TAYLOR,
Attorneys for Plaintiff and Appellee.

Entered in Court Journal No. 17, page 714.

Filed Mar. 15, 1930. [59]

[Title of Court and Cause.]

STIPULATION RE PRINTING RECORD.

IT IS HEREBY STIPULATED that in printing the record to be used in hearing the appeal taken in the above-entitled cause that the title of the court and cause shall be printed on the first page of the record and that thereafter the same may be omitted and in place thereof the words "Title of

Court and Cause'' be inserted; also that all endorsements on all papers may be omitted except the Clerk's filing marks, and the admission of service thereof.

Dated at Fairbanks, Alaska, this 15 day of March, 1930.

HARRY E. PRATT,
LOUIS K. PRATT,
Attorneys for Appellant.
JNO. A. CLARK,
CHAS. E. TAYLOR,
Attorneys for Appellee.

Filed Mar. 15, 1930. [60]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, Robt. W. Taylor, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing, consisting of 60 pages, constitutes a full, true and correct transcript of the record on Appeal in Cause No. 3274, entitled Alaskan Airways, Inc., a Corporation, Plaintiff, vs. Ralph Wien, Defendant, and was made pursuant to and in accordance with the praecipe of the defendant filed in this action, and by virtue of the said appeal and citation issued in said cause, and

is the return thereof in accordance therewith, and I certify that the citation, order enlarging time to docket cause and stipulation *re* printing record annexed hereto are the originals thereof.

And I do further certify that the index thereof, consisting of page number i, is a correct index of said transcript of record, and that a list of attorneys, as shown on page number ii, is a correct list of the attorneys of record; also that the cost of preparing said transcript and this certificate, amounting to $25.50, has been paid to me by counsel for appellant in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 19th day of March, 1930.

[Seal] ROBT. W. TAYLOR,
Clerk of the District Court, Territory of Alaska,
Fourth Division. [61]

[Endorsed]: No. 6116. United States Circuit Court of Appeals for the Ninth Circuit. Ralph Wien, Appellant, vs. Alaska Airways, Inc., a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Fourth Division.

Filed April 1, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6116

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RALPH WIEN,
Appellant,

vs.

ALASKAN AIRWAYS INC. (a corporation),
Appellee.

BRIEF FOR APPELLANT.

HARRY E. PRATT,
LOUIS K. PRATT,
Fairbanks, Alaska,
HERMAN WEINBERGER,
Merchants Exchange Building, San Francisco,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 6116

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RALPH WIEN,
Appellant,

vs.

ALASKAN AIRWAYS INC. (a corporation),
Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a judgment and order of the District Court of the Territory of Alaska granting to the appellee a temporary injunction enjoining and restraining the appellant from entering into competition in any way with appellee company, and from accepting employment as an airplane pilot from any company other than appellee.

The appellee, Alaskan Airways Inc., referred to hereinafter as Alaskan Company, is a corporation organized and existing under the laws of Delaware with its principal office in that state. Prior to August 6, 1929, it had purchased the business of an airplane common carrier company and was itself conducting

an airplane transportation business in the Territory of Alaska. (Tr. p. 29.) During this time the appellant, Ralph Wien, a resident of the Territory of Alaska, was one of the stockholders in the Wien Alaska Airways Inc., referred to hereinafter as Wien Company, a competing corporation, and was employed by it as a mechanic. (Tr. p. 2.)

On August 6, 1929, the appellee, Alaskan Company, purchased all of the property, assets, and business of the Wien Company, including its good will, for the sum of $65,000.00. (Tr. p. 3.) In connection with such purchase the Wien Company and its stockholders, including the appellant, executed to the Alaskan Company a bill of sale which contained provisions to the effect that for a period of three years from the date thereof they would refrain from entering into competition with it, and from becoming connected with, or accepting employment from, any other company or individual which might enter into competition with the Alaskan Company. (Tr. p. 7.)

At the time this purchase was consummated, namely, on August 6, 1929, the Alaskan Company was, and had been, pursuing its transportation business in the Territory of Alaska. (Tr. p. 29.) Just about at the time of its purchase of the Wien Company, it was negotiating for the purchase, or it had already purchased, certain other airplane companies operating in the Territory of Alaska, with the apparent purpose of acquiring unto itself the entire airplane transportation business in the Territory of Alaska. (Tr. p. 30.)

When the transaction with the Wien Company was consummated, the Alaskan Company was not, as a foreign corporation, qualified to do business in the Territory of Alaska, in accordance with the requirements of the laws of that Territory. It did not comply with these requirements until a considerable time afterward. (Tr. p. 29.)

It is charged in the complaint that the appellant, Ralph Wien, in January, 1930, entered the employ of a certain copartnership carrying on a general airplane transportation business in Alaska, and has been engaged as an aviator and pilot for such copartnership, and continues to carry on his business of flying in active competition with the Alaskan Company's business, to its damage. What the appellee seeks to enjoin in this proceeding is the alleged breach by the appellant of the provisions of the bill of sale purporting to restrict competition. (Tr. pp. 4 and 5.)

The Court's injunction forbids the appellant, Wien, from entering into competition in any way with the Alaskan Company in the conduct of its airplane business in the Second, Third, and Fourth Judicial Divisions of Alaska, and from entering into any business that will conflict in any way with it in the conduct of its airplane business in said Divisions of Alaska, and from becoming interested in any corporation or copartnership engaged in said Divisions in the airplane business, and from accepting employment with any airplane company, corporation, or association, except the Alaskan Company, as pilot, mechanic, or

manager, in the aforesaid Divisions of Alaska. (Tr. pp. 20 and 21.)

The question presented on this appeal is as follows:

Did the District Court have power to grant the temporary injunction restraining the alleged breach by the appellant, Wien, of the contract in question, which contract is illegal and void for the reasons that:

(a) The appellee, Alaskan Company, at the time the contract was made, had not qualified to do business in Alaska as required by the laws of the Territory; and

(b) The provisions of the contract are violative of Federal statutes forbidding undue and unreasonable restraints of trade?

ASSIGNMENT OF ERRORS.

The Court's order granting the temporary injunction herein is erroneous for the following reasons:

(a) The complaint and affidavits of Charles L. Thompson and Ralph Wien before the Court on the hearing for said temporary injunction, the same constituting the entire evidence in the matter, established without dispute that the plaintiff, a foreign corporation, was doing business in the Territory of Alaska prior to and at the time of and at all times after the making of the contract which forms the basis of plaintiff's suit and which was set forth in its complaint as Exhibit "A," and that said contract was made in Alaska with residents of Alaska at a

time when said plaintiff had not complied with the laws of Alaska relative to foreign corporations doing business therein in that said corporation filed its articles of incorporation, its financial statement, and its designation of an agent upon whom service of process might be made in the office of the clerk of the District Court for the division wherein it intended to carry on business, to-wit, the Fourth Judicial Division, Territory of Alaska, on the 12th day of September, 1929, and not before, and it filed said articles of incorporation, financial statement, designation of agent, and paid its corporation tax and other fees required by law in the office of the auditor of the Territory of Alaska upon the 22nd day of October, 1929, and not before, and that, therefore, the contract of August 6, 1929 (Exhibit "A" in plaintiff's complaint), forming the basis of plaintiff's suit, was void and could not be enforced in favor of the corporation under the laws of Alaska, to-wit: Sections 654, 655, and 660, Compiled Laws of Alaska, as amended by Chapter 69, Session Laws of Alaska, 1923; Chapter 32, Session Laws of Alaska, 1923, and Section 6, subdivision 7, Chapter 118, Session Laws of Alaska, 1929.

(b) The affidavits of Charles L. Thompson and Ralph Wien and the plaintiff's complaint in this cause showed that the contract marked Exhibit "A" in plaintiff's complaint and forming the basis of this suit was invalid as creating a monopoly of commerce in freight and passengers in the air by means of airplanes in the Second, Third, and Fourth Divi-

sions of the Territory of Alaska, and invalid as in restraint of trade, and as also indirectly accomplishing the purchase by plaintiff of the stock of corporations then engaged in the same line of business, all in violation of Section 3 of the Sherman Act (U. S. Code, p. 351) and Sections 1 and 7 of the Clayton Act. (U. S. Code, pp. 352 and 353.)

ARGUMENT.

I.

COURTS DO NOT RESTRAIN BREACHES OF ILLEGAL OR VOID CONTRACTS.

As we will hereinafter point out, the contract which constitutes the basis of the injunction is void and cannot be enforced. It is an elementary rule that the breach of void contracts, or contracts tainted with illegality, cannot be restrained by the Courts.

> "He who seeks the aid of equity to enjoin the violation of an agreement, or for the protection of his contract rights, must himself come into court with clean hands * * * nor will equity interfere to enjoin the breach of a contract which is illegal and void as against public policy."
>
> *High on Injunctions,* 4th Ed., Section 1119.

> "An injunction will not issue to prevent the breach of a contract which is for any reason unenforceable, as where the contract is against public policy or is of doubtful propriety * * *"
>
> 32 *Corpus Juris,* pp. 189, 190.

> "Before the court will enjoin a breach of such a contract, there must be no doubt about its validity * * *"
>
> 32 *Corpus Juris,* p. 217.

And particularly a Court will not issue a temporary injunction in a doubtful case where it will cause the defendant greater loss than will be suffered by the complainant.

> "The rule has been frequently laid down broadly that a preliminary injunction will not issue where the right which the complainant seeks to have protected is in doubt, where the right to the relief asked is doubtful, or except in a clear case of right. It has similarly been declared that the right asserted by complainant must be perfectly clear and free from doubt where the effect of a preliminary injunction will be more than merely the maintenance of the status quo, *or where the injunction will cause defendant greater loss and inconvenience than that which would be suffered by complainant in the absence of an injunction,* and that an injunction must be refused if complainant's case is so doubtful that it does not appear reasonably probable that he has the right claimed and that it is being violated * * *" (Italics ours.)
>
> 32 *Corpus Juris,* pp. 36, 37.

> "The general rule is well settled that, when the principles of law on which the right to a preliminary injunction rests are disputed and will admit of doubt, a court of equity will not grant such injunction without a decision of the courts of law establishing such principles, although satisfied as to what is a correct conclusion of law upon the facts."
>
> 32 *Corpus Juris,* p. 40.

II.

THE TERMS OF THE CONTRACT, THE ALLEGED BREACH OF WHICH IS SOUGHT TO BE ENJOINED, ARE VOID UNDER THE LAWS OF ALASKA.

It is undisputed that at all of the times involved in this controversy the complainant was a foreign corporation and the defendant was a resident of the Territory of Alaska. (Tr. pp. 1, 32.) It is further undisputed that the contract containing the terms and conditions, the breach of which is here sought to be restrained, was made and executed on August 6, 1929. (Tr. p. 2.)

As shown by the statements contained in the defendant's affidavit, which also are undisputed, the Alaskan Company, the foreign corporation, was, on August 6, 1929, and prior thereto, "doing business" in the Territory of Alaska as a common carrier, transporting passengers and freight for hire from point to point therein, and did in fact do a general transportation business by airplane within the Territory of Alaska between the first and sixth days of August, 1929, and at all times thereafter, and engaged as a common carrier in carrying passengers and freight for hire from point to point within the Territory of Alaska and from points in Alaska to and from Siberia and Canada. (Tr. p. 30.)

It is further declared in such affidavit, and the fact is undisputed, that the appellee foreign corporation did not file a copy of its charter or articles of incorporation, its designation of an agent upon whom service of process in Alaska might be made, or its financial

statement in the office of the clerk of the District Court, Fourth Division, until September 12, 1929 (Tr. p. 29); nor did it file a copy of its charter or articles of incorporation, financial statement, and designation of agent in the office of the auditor of the Territory of Alaska until October 22, 1929 (Tr. p. 29); nor did it pay the corporation tax and other fees required by law of foreign corporations doing business within Alaska, until October 22, 1929. (Tr. p. 29.)

By the act of the legislature of the Territory of Alaska, Chapter 69, Session Laws of Alaska, 1923, amending Section 654, Chapter 23, Compiled Laws of Alaska, it is provided that

> "No corporation or joint stock company, other than those formed to engage in life, fire, marine, guaranty or other insurance business, organized under the laws of the United States, or the laws of any State or Territory of the United States other than the Territory of Alaska, or the laws of any foreign country, shall do or engage in business within the Territory of Alaska without first having filed in the office of the Secretary of the Territory and in the office of the Clerk of the District Court for the Judicial Division wherein it intends to do or engage in business, the following papers, viz.:
>
> (a) A duly authenticated copy of the charter or articles of incorporation of such corporation or company, and of any amendments thereto,
>
> (b) A statement, verified by the oath of the president, vice-president, or other acting head, and the secretary of such corporation or company, and attested by a majority of its board of directors or, if said board of directors consists of more than five members, by not less than three members of said board, showing:

(1) The name of such corporation or company and the location of its principal office or place of business without the Territory and, if it is to have any place of business or principal office within the Territory, the location thereof;

(2) The amount of the capital stock of such corporation or company;

(3) The amount of the capital stock of such corporation or company actually paid in in money;

(4) The amount of the capital stock of such corporation or company paid in in any other way than in money and in what;

(5) The amount of the assets of such corporation or company and of what such assets consist and the actual cash value thereof;

(6) The liabilities of such corporation or company and, if any of its indebtedness is secured, how secured and upon what property.

(c) A certificate, under the seal of such corporation or company and the signature of its president, vice-president, or other acting head, and its secretary, if there be one, certifying that such corporation or company has consented to be sued in the courts of the Territory upon all causes of action arising against it in the Territory and that service of process may be made upon some person, a resident of the Territory, whose name and place of residence shall be designated in such certificate; such agent to reside in a city, town or community in said Territory wherein a Clerk of the District Court, Deputy Clerk of the Court, United States Marshal, or Deputy United States Marshal, maintains an office. Such service, when so made upon such agent, shall be valid service upon such corporation or company * * *."

(Subdivision 7 of Section 6 of Chapter 118, Session Laws of Alaska, 1929, merely prescribes that the Auditor shall perform and discharge all of the duties and

functions imposed upon the Secretary of the Territory mentioned in the foregoing act.)

Chapter 32, Session Laws of Alaska, 1923, amending Section 660, Chapter 23, Compiled Laws of Alaska, provides as follows:

> "If any corporation or company shall fail to comply with any of the provisions of this Chapter, all contracts made by such corporation or company with residents of the Territory of Alaska, made in the Territory, shall be void as to the corporation or company, and no court of the Territory shall enforce the same in favor of the corporation or company."

All of these provisions of the laws of the Territory of Alaska were in full force and effect at the time the contract involved in this controversy was executed.

It cannot be disputed that at and prior to the execution of the contract the Alaskan Company was "doing business" within the Territory of Alaska within the accepted meaning of that term recognized by the Courts. Indeed, the very transaction itself evidenced by the contract, the purchase of the stock, business and assets of the Wien Company, constituted an act of "doing business" in and of itself. (*Central Life Securities Co. v. Smith*, 236 Fed. 170.) Add to this the further facts that the Alaskan Company had been actually engaged in transporting freight and passengers within the Territory, and had also purchased the business and assets of other air transportation companies, and the conclusion is inescapable that this foreign corporation was actually "doing business" in the Territory of Alaska when the contract was made.

It may possibly be urged by the opposing counsel that in a situation of this kind, the nullity or illegality of a contract which has already been fully executed cannot be urged. We desire to remind the Court that the particular provisions of the contract now claimed to be void and illegal, and upon which the injunction is based, are purely executory. The restraints imposed upon the defendant were to continue for a period of three years. By this proceeding the complainant is seeking to enforce future compliance with those terms. Obviously a contract may be partly executed and partly executory. (13 *C. J.* 245.) In the instant case, that part of the contract having to do with the purchase and conveyance of the stock, business, property, and assets is already executed. On the other hand, that part of the contract pertaining to the attempted restraint against future competition is purely executory. It is alleged that Wien is violating, *and threatens to continue to violate,* these particular provisions. (Tr. p. 4.) Indeed, the whole purpose of the preliminary injunction is to prevent a future breach thereof during the three year period. Therefore, under these conditions it can not possibly be said that this contract has been completely executed and, that, therefore, the appellant is prevented from urging its illegality.

We particularly call the Court's attention to the Territorial statute which makes this contract void. (pp. 9-10, this Brief.) It does not merely impose a penalty upon a foreign corporation for failing to qualify; it specifically declares that all contracts made by an unqualified corporation with residents of the

Territory, made in the Territory, *shall be void* as to the corporation, and that no Court of the Territory shall enforce the same in favor of the corporation. The intent of the legislation could not possibly be clearer or more definite.

We are aware of the contrariety of opinion upon the general question as to whether contracts made by unqualified foreign corporations are void or voidable. This conflict in the authorities, however, happens only by reason of the difference in wording of various statutes on the subject which have come to the attention of the Courts.

In *Thompson on Corporations* (2nd Ed., Section 6707), the author says:

> "Under some statutes prohibiting foreign corporations from doing business until they have complied with the requirements imposed by such statute, any contracts made without having complied with the statutory provisions are held to be absolutely void, and the statute is enforced no matter how harsh its provisions may be."

There can be no doubt that the District Courts in Alaska have recognized that such contracts are void. In *Burr v. House,* 3 Alaska 641, in which the effect of the Alaska statute was considered, the Court said:

> "That foreign corporations doing business in Alaska should comply with local requirements is beyond question, and the letter of the law, and the penalties contained in sections 228 and 231 of the Code of Alaska for failure to comply with the said requirements, will be enforced when brought to the attention of the court in proper pleadings.
>
> It is manifest from the reading of these sections of our Code, that Congress, in order to

> secure compliance by foreign corporations with its terms, made such compliance precedent to the right of any such corporation to do business within the territory, imposed a penalty for non-compliance, and further closed the doors of courts therein to such corporations for the enforcement of any contract arising while not so complying with all the specified requirements."

It will be noted in the above cited decision that, although the defense of lack of qualification of the foreign corporation was disallowed solely because it had not properly been pleaded, nevertheless the effect of the statute was clearly announced and the defense held to be good when sufficiently urged.

In re Craig Lumber Co., 6 Alaska 356, the statute in question was considered. The contract there was not made with a resident of Alaska, and, not being within the express prohibitions of the statute, was held not to be void. But the Court took occasion to say that:

> "It is only where a foreign corporation which has failed to comply with the statutory requirements deals with a citizen of Alaska *that the contracts are void*, and the court is enjoined not to enforce the same in favor of the corporation." (Italics ours.)

Again, in *Alaska Siberian Nav. Co. v. Polet,* 7 Alaska 374, the Court took occasion to announce the following:

> "A foreign corporation brought suit in the district court, without alleging its compliance with the Alaska statute requiring it to file its articles of incorporation, etc., in the office of the Secretary of the Territory, etc. *Held,* the court may take judicial notice of this want of averment, *and such failure renders contracts made with res-*

> *idents of the Territory, in the Territory, void, and that no court of the Territory shall enforce the same in favor of the corporation."* (Italics ours.)

Cobb v. McDonald-Weist Logging Co. (Alaska), 278 Fed. 165, is an Alaska case in which this Court held that a contract made by an unqualified foreign corporation could not be void because the other party to the contract was not a resident of Alaska. But it is clear that this Court recognized the force and effect of the Alaska statute when it said:

> "Comp. Laws of Alaska, 1913, Section 660, *avoiding contracts* with a citizen of that district by a foreign corporation or company failing to comply with statutory provisions as to filing statements or certificates, has no application, where neither of the parties to the contract was a citizen of Alaska * * *." (Italics ours.)

And, likewise, in *Ross-Higgins Co. v. Protzman et al.* (Alaska), 278 Fed. 699 at 702, this Court indicated its view of Section 660 when it said:

> "To adjudge a contract *wholly void* under Section 660 as to the corporation, it must clearly appear that the contract was made with a citizen of the district." (Italics ours.)

In *Dunn v. Utah Serum Co.* (Utah), 238 Pac. 245, the Utah statute was under consideration, the language of which with respect to the points involved here is almost identical with the Alaskan statute. In denying the foreign corporation any relief under the contract, the Court, among other things, said (at p. 251):

> "Where it is made to appear that any foreign corporation, except an insurance corporation, is

> doing business within this state within the meaning of Section 945, without having complied therewith, every contract whatsoever made or entered into by or on behalf of such corporation within this state, or which is to be executed or performed within this state, *is wholly void on behalf of such corporation.* * * * The statute strikes down every contract and transaction whatsoever made or had within the state by such corporation. The language of section 947 includes all transactions whatsoever, the first contract as well as the last, implied contracts as well as those which are expressed, and excludes the idea that such a corporation may pick out any particular contract made within the state and claim any rights under or sue upon it." (Italics ours.)

In the last cited case, the Court took occasion to discuss the contention of the foreign corporation that the other party was estopped from urging the terms of the statute by the equitable principle that he had accepted benefits from the corporation. As to this contention the Court said:

> "We cannot apply this equitable principle in the instant case because to do so would violate that provision of the statute which declares that no offending foreign corporation shall have the right to sue or maintain any proceeding in the Courts of this state on any claim, interest, or demand arising or growing out of any transaction had within this state. The language of Section 947 is so broad and so rigid as to close against this appellant every possible avenue of escape, resulting in an injustice to it which the Court is powerless to avoid."

In *re Springfield Realty Co.* (Michigan), 257 Fed. 785, the Michigan statute was involved, which declared that a foreign corporation was not capable of making a valid contract in that State until it had

fully complied with the requirements of the act. The Court held that a contract made by an unqualified foreign corporation was absolutely void.

It seems clear that the weight of authority is to the effect that where the statute plainly says so, contracts made by unqualified foreign corporations are void. In some jurisdictions, such contracts are held to be null; in others, the corporation is prevented from maintaining any action thereon; in others, they are held to be void, even though the statute contains no express provision to that effect.

See

12 *Ruling Case Law,* pages 80 and 81, and Citations in Notes;

14a *Corpus Juris*, page 1294 et seq., and Notes.

A few more of the comparatively recent decisions on the subject are the following:

Bothwell v. Buckbee, Mears Co., 275 U. S. 274;
Flinn v. Gillen (Missouri), 10 S. W. (2d) 923;
Hemphill v. Orloff (Michigan), 213 N. W. 867;
Langston v. Phillips (Alabama), 89 So. 523.

We recognize that in certain instances the question sometimes arises as to whether or not the contract is void or voidable. Some Courts have used these terms interchangeably, which has had a tendency to create some confusion. This question, however, is of no importance here since the record presents a case where, to give any effect to the statute at all, is to hold the contract void. The parties to the original contract are here before the Court, and the defendant, at the first opportunity afforded him to do so,

sets up and urges the defense of lack of qualification of the foreign corporation. Since the statute explicitly declares that such an unqualified corporation shall not be permitted to stand upon such a contract, and the Court is abolutely without power to enforce the same, the contract is, to all intents and purposes, completely void "as to the corporation."

Even by those Courts which have held that the contract is not void but voidable, it is recognized and conceded that when the unqualified corporation sues upon the contract, the defendant has a perfect defense under the statute. In *M. S. Cohn Gravel Co. v. Southern Surety Co.* (Oklahoma), 264 Pac. 206, the defendant was not permitted to urge the defense because he had theretofore sued upon the contract itself, and had thus failed to assert its invalidity. At the same time, however, the Court, among other things, said:

> "Section 5435 gives every citizen who contracts with a foreign corporation, prior to the corporation's having complied with the law and received a permit to transact business within this state, a complete defense against the enforcement of such contract, if he desires to claim it. But if the contract is founded on a meritorious consideration, as in this case, and the citizen of the state does not repudiate the contract and claim the defense given him by the statute, but, on the contrary, both parties invoke the contract as the basis of their rights and obligations, who should be permitted to plead the statute? The answer is, 'No one.' Under the latter section, the corporation must domesticate before it can bring its suit, *and even then the citizen has a perfect defense against the enforcement of the contract by invoking the statute.* This construction fulfills the purpose of the statute and is in accord with many respectable authorities." (Italics ours.)

Likewise in *Tarr v. Western Loan and Savings Co.* (Idaho), 99 Pac. 1049, the Court sustained the right of the other party to the contract to urge against the unqualified foreign corporation its failure to observe the statute respecting its qualification to do business in the State. The Court there said:

> "On the other hand, appellants (the other party to the void contract) had a perfect right under the statutes and repeated decisions of this court to plead in defense of the action to foreclose the corporation's noncompliance with the statute."

III.

THE ILLEGALITY AND NULLITY OF THE CONTRACT ARE SUFFICIENTLY SHOWN.

In the written opinion of the learned District Judge, which is contained in this record (Tr. pp. 33 et seq.), it appears that the Court saw fit to attack the sufficiency of the averments set forth in defendant's affidavit in opposition to the granting of the injunction. We respectfully submit to this Court, however, that the comments of the learned District Judge upon the sufficiency of the defendant's affidavit, are wholly unjustified. As an example of this, we call attention to the statement in the Opinion that the allegation in the affidavit that the Alaskan Company was "doing business" in the Territory is a mere conclusion of the affiant. The affidavit distinctly states that the Alaskan Company—

> "Did in fact as a common carrier transport passengers and freight for hire from point to point within the Territory of Alaska, and did in fact do a general transportation business by air-

> plane within the Territory of Alaska, between the first and sixth days of August, 1929, and at all times thereafter * * * and engaged as a common carrier in carrying passengers and freight for hire from point to point within the Territory of Alaska, and from points in Alaska to and from Siberia and Canada." (Tr. p. 30.)

It is difficult to understand how the fact of "doing business" by the foreign corporation in the Territory could be better pleaded. Is it not a pure statement of fact to say that the foreign corporation was engaged as a common carrier in transporting passengers by airplane from point to point within the Territory? Let it be borne in mind that this declaration is undisputed by the complainant.

Again, the defendant has set forth in his affidavit the fact that the foreign corporation did not conform to the conditions of qualification until after the execution of the contract. He does this by stating that the corporation *did qualify* and conform to the statutory requirements, *but not until September and October, subsequent to the making of the contract on August 6th.* Let it again be borne in mind that these statements are undenied by the complainant. These particular averments in the affidavit are assailed by the District Judge upon the ground that they are made by "an airplane pilot or mechanic or sometimes manager of an airplane corporation, who is also the defendant in this suit." (Tr. p. 44.) It seems that the Court below holds these statements to constitute mere hearsay testimony. Even admitting this for the sake of the argument, is it justifiable, when facts are thus brought to the attention of the Court, sufficient

to raise questions of law making the complainant's right to a preliminary injunction extremely doubtful, for the Court to utterly close its ears to such established facts, undenied, and in fact admitted by the complainant, and thereby completely deprive a party in litigation of a complete legal defense? If there had been the slightest denial of these averments by the complainant; if the nature of the facts were such as to require the highest class of evidence to prove the same; or if, after suggestion from the Court, the defendant had failed to satisfy the Court as to the class of evidence which it might see fit to require, then the situation might be somewhat different.

The leaning of the District Court is also shown by the following statement in the Opinion (Tr. p. 42):

> "What particular act did plaintiff do? Whom did plaintiff transport by air for hire, and when? Where did such alleged transportation take place? What alleged freight was carried, and when and where? What were the terms of such alleged contracts of hiring? Was anything of value paid by anybody for the alleged services and when? Did the plaintiff authorize such transportation?
>
> "It is further said that the plaintiff 'held itself out to the general public as being a common carrier in the business of transporting passengers and freight by air from point to point in Alaska,' and the Court asks similar questions with reference to this conclusion of law.
>
> "It is further said that the plaintiff 'did in fact as a common carrier transport passengers and freight for hire.' Did the plaintiff transport the passengers and freight by airplanes or otherwise?"

Apparently, the trial Court conceived that a proper allegation in the affidavit should have been about as follows:

> "That on the 2nd day of August, 1929, at or about 10 o'clock A. M. of said day, plaintiff corporation, then and there the owner and in possession of an airplane, did use the said plane for the purpose of carrying, and did actually carry, therein, one case of eggs for an individual named John Smith, said case of eggs weighing 15 lbs., at and for the price of ten cents per pound, from A in Alaska to B in Alaska, which freight charge was paid by said John Smith to said plaintiff corporation and accepted by it."

Such allegation, in the view of the trial Court, should have been followed by others concerning other cases of eggs, or merchandise, of other consignors.

The mere statement of such allegation in detail is sufficient to show the absurdity of requiring the facts to be set forth as in a criminal indictment.

We submit, the allegation in the affidavit that the plaintiff "did in fact as a common carrier transport passengers and freight for hire" is sufficient.

This allegation of fact was undisputed *and the ultimate fact was the only one before the Court.* We cannot conceive of what difference it could possibly make whether the "doing business" by the plaintiff company was in carrying for hire on a certain day and for a certain individual, a case of eggs, or some other and different merchandise; or whether or not it was from A to B in Alaska, or from C to D in that Territory.

We feel it our duty to say to this Court that the attitude of the learned District Judge, as indicated

in his opinion, appears to have been calculated to nullify a perfect defense, the facts establishing which are admitted to exist by the other party to the litigation.

The defendant is also criticized for failing to interpose a verified answer to complainant's complaint. Such was entirely unnecessary.

> "Affidavits may be used in opposition to the motion for an injunction, whether made by defendant or others, and although no plea or answer has been interposed."
>
> 32 *Corpus Juris,* pages 354, 355.

In its complaint the plaintiff saw fit to eliminate any allegation as to its qualification as a foreign corporation *prior to the time it entered into the contract.* If it had set forth the true fact, the defendant could have interposed a demurrer or motion to dismiss, and must have prevailed thereon. However, since the complaint contained no allegations of fact raising the question of law upon which the defendant depends for a defense, it became necessary for the defendant to set up those facts by his own sworn affidavit. We know of no rule of pleading in injunction cases which prevents this or holds it to be improper.

We believe that with respect to the particular statute in question, Section 660, Compiled Laws of Alaska, the Courts, wherever it has come up for consideration, have indicated that contracts made by foreign corporations in violation thereof are void as to the corporation, and that the Courts are without power to enforce the same where the record shows

that the defendant has a right to rely, and does rely, upon the defense given him by the statute.

IV.

THE CONTRACT IS VIOLATIVE OF THE FEDERAL STATUTES FORBIDDING UNDUE AND UNREASONABLE RESTRAINTS OF TRADE.

The particular terms of the contract, the breach of which is sought to be enjoined, are as follows:

> "That neither said corporation nor any of the stockholders thereof will, for a period of three years from the 6th day of August, A. D. one thousand nine hundred twenty-nine, enter into competition in any way with party of the second part herein; that the parties of the first part will not enter into any business that will conflict in any way with the party of the second part in the conduct of its business, and will not become stockholders or have any interest in any other company or copartnership, and will not enter into any agreement with any individual for the establishment, operation, conduct, or management of any business that will compete with the business of party of the second part, and will not, during said period, within the Territory of Alaska, accept employment with any airplane company, corporation, or association, and will not associate themselves with any individuals who may be engaged commercially in conducting any business that would in any way compete with the business of party of the second part, and will not assist in the organization of or be interested in any business within the Territory of Alaska, during a period of three years from the 6th day of August, A. D. one thousand nine hundred twenty-nine, that would compete in any way with the business conducted by the party of the second part." (Tr. pp. 8, 9.)

It is alleged in plaintiff's complaint that prior to the execution of the contract, the defendant, Wien, was a stockholder and an active member of the Wien Company, and that he was employed by said company *as a mechanic.* (Tr. p. 2.) The particular act on the part of the defendant charged by the complaint is that:

> "The said Ralph Wien, on or about the tenth day of January, 1930, entered into the employ of and associated himself with one Percy Hubbard and one A. Hines, co-partners doing business under the name and style of the Service Motor Company, at Fairbanks, Alaska, and carrying on a general transportation of passengers and freight between points in Alaska, and that, ever since the said tenth day of January, 1930, the said Ralph Wien has been engaged as aviator and pilot of an airplane for said copartnership, and, in violation of his said promises and agreements, continues to carry on the business of commercial flying, in active competition to the business of this plaintiff, to the damage of plaintiff." (Tr. pp. 4, 5.)

By the temporary injunction granted by the District Judge, it is provided:

> "That the defendant Ralph Wien be enjoined and restrained during the pendency of this action and until the final determination thereof from entering into competition in any way with the plaintiff in the conduct of its airplane business in the Second, Third, and Fourth Judicial Divisions of Alaska, and from entering into any business that will conflict in any way with the plaintiff in the conduct of its airplane business in said Divisions of Alaska, and from becoming interested in any corporation or copartnership engaged in said divisions in the airplane business, and from accepting employment with any air-

> plane company, corporation or association, except the plaintiff company, as pilot, mechanic, or manager in the aforesaid Divisions of Alaska." (Tr. pp. 20, 21.)

The defendant contends that the particular terms of the contract above set forth, and which the Alaska Company induced the parties of the second part to sign, are violative of the Federal statutes prohibiting the stifling of competition. In the first place, that particular provision of the contract now under consideration is prohibited by the so-called "Sherman Act," Section 3 of which reads as follows:

> "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any *Territory* of the United States or of the District of Columbia, * * * is declared illegal." (Italics ours.)

The laws of the Congress of the United States are effective in the Territories belonging to the Federal Government. (United States Constitution, Section 3, Article 4.) Consequently, the "Sherman Act," and also the "Clayton Act" hereinafter referred to, are effective in the Territory of Alaska, *not only with respect to matters having to do with interstate commerce, but also to all local matters which are embraced within the meaning and intent of those statutes.* (See *Thornton's Treatise on the Sherman Act,* Section 306a.) It follows, therefore, that every contract in restraint of trade or commerce, made in the Territory of Alaska, is illegal.

We are mindful of that branch of judicial decision to the effect that upon the sale of a business, including its good will, the purchaser, if the contract so

provides, may be required to agree not to act in derogation of that good will. The general rule, however, extends just so far and no further. Unbridled and unlimited restrains upon the seller are never permitted, and the purchaser may exact only such a degree of restriction as is fair and just and necessary for his reasonable protection.

> "While the sale of a business and the surrender of the good will pertaining thereto, and an agreement thereunder, within reasonable limitations as to time and territory, not to enter into competition with the purchaser, when made as part of the sale of a business, and not as a device to control commerce, is not within the federal Anti-Trust Law * * * the imposition of a restraint greater than necessary to afford fair protection to the legitimate interests of the purchaser, or contractor, constitutes an unreasonable restraint under the Sherman Act. Shawnee Compress Co. v. Anderson, 209 U. S. 423."
>
> *United States v. Great Lakes Logging Co.,* 208 Fed. 733 at 742.

Let us briefly consider what is attempted by the provisions of the contract here. The defendant was one of a number of stockholders of a corporation engaged in the business of airplane transportation. He was employed as a mechanic in that corporation; and the reasonable inference is that such employment was the principal, if not the sole, means of his earning a livelihood. The corporation sold its business and assets and the good will connected with that, the corporation's, business.

We do not argue that the purchaser may not exact an agreement from the seller corporation itself not

to thereafter compete with the purchaser, nor that the stockholders individually may not agree to refrain from reorganizing and associating together as a corporation or association for the purpose of carrying on a competing business. We may even go further and admit, for the sake of the argument, that the individual stockholders may, within reasonable limits, agree not to individually control or manage a business in competition with the purchaser's business. In the instant case, however, the defendant merely went to work for another concern, known as the Service Motor Company, as an aviator and pilot of an airplane for that company.

There is no showing whatever on behalf of the complainant as to how its business is in any way affected by Wien's taking employment with the Service Motor Company as one of its aviators and pilots. There is no allegation that because Wien acts as a pilot for the Service Motor Company such fact in and of itself creates competition with the Alaskan Company which otherwise it would not have if another and different pilot operated one of the Service Motor Company planes. It does not necessarily follow that because Wien flies one of the ships of that concern such fact gives to the public any evidence of his former connection with the seller corporation, where, as a matter of fact, he was a mechanic, or affects in the slightest degree the business of the purchaser. It is alleged in the complaint that Wien continues to act as such aviator and pilot in active competition with the business of this plaintiff, to the damage of the plaintiff. But if the Alaskan Company suffers any detriment

at all by the simple fact of Wien's being employed by the Service Motor Company, it could as well suffer such detriment if any other aviator or pilot took the job, and this no doubt (in fact we are so advised) has actually happened.

Incidentally, the complainant makes no showing of the elements of value of the good will. It may be urged that the complaint alleges that a consideration of $25,000.00 was paid by the purchaser for the good will. Yet, for all that the complaint and affidavit show, Wien may have received but an infinitesimal part of that alleged consideration, or none at all.

To be entitled to a preliminary injunction, a complainant must make a satisfactory showing that it is suffering, or is likely to suffer, irreparable injury from the acts of the defendant. The necessity of the injunction should appear clear to the Court.

> "An injunction, being the 'strong arm of equity,' should never be granted except in a clear case of irreparable injury, and with a full conviction on the part of the court of its urgent necessity."
>
> *High on Injunctions*, 4th Ed., page 36.

All of which, we submit, has a direct bearing upon the question of the reasonableness of the provisions of the contract and the fairness of the terms of the injunction. We believe that when a Court undertakes to restrain a party from pursuing his vocation, it should have presented to it a clear case, free from doubt as to the necessities for protection, and as to the legal propriety therefor. Bearing in mind the undisputed facts of the situation here presented, does

it seem reasonable or fair for the Court to order the defendant, even for the period of the pendency of this action, to desist from accepting employment with an airplane company, corporation, or association, as a pilot?

In considering the legality of the contract and the reasonableness and fairness of the injunction, there should be borne in mind the background of facts plainly showing that, just at the time the contract was made, this complainant was engaged in a plan—and we do not hesitate to call it a conspiracy within the terms of the Federal statutes—to restrain trade and stifle competition in the airplane transportation business in the Territory of Alaska. It is not denied that immediately prior to the making of the contract the complainant had purchased the Bennett-Rodebaugh Airplane Company, and was in the act of purchasing the Anchorage Air Transport, Inc. Undoubtedly all this was pursuant to a general design to buy up all of the airplane transportation companies then operating in the Territory. The contracts in connection with these purchases were identical in terms with the contract here involved. (Tr. p. 31.) These facts are not denied by the complainant, the only denial being that the contract forming the basis of this action was not entered into by the plaintiff for the purpose of creating a monopoly of the airplane business in Alaska. The undisputed fact exists that the contract involved here was one of the elements of the plan on behalf of the complainant to buy up all the stock of all of the airplane businesses in the Territory of Alaska. These circumstances add a further taint of

illegality to the contract which is sought to be enforced here. It is in direct contravention to the terms of the Clayton Act, which provides that:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."
>
> *U. S. Code,* Title 15, page 220.

Lest there be any doubt about the intention of the Alaskan Company in pursuing this plan, we call attention to one of the provisions of the contract, which is as follows:

> "That it is understood that the transfer by party of the first part is a transfer of all its assets and good will, both of itself as a corporation and of its stockholders, and its agreement not to enter into competition with the party of the second part or its successors in interest, is a part of the consideration for the purchase by party of the second part of the assets and good will of the party of the first part. * * *
>
> That in construing this agreement, it is understood that the party of the second part will be engaged in the aviation business, carrying passengers and freight for hire, and that the agreement on the part of the parties of the first part to refrain from entering into any business that would compete with party of the second part refers to said aviation business and business incidental thereto." (Tr. pp. 10, 11.)

The language of the Court in *United States v. Great Lakes Logging Co., supra,* is significantly applicable to the situation presented here. The Court, among other things, said:

> "Likewise the restrictions upon competition imposed in the case of all the joint operating contracts referred to were greater than necessary for the protection of the Towing Company's legitimate business interests at the *local service* points covered by such contracts. No more effective method could well be devised for unifying the towing interests in question than by combining in one corporation the stocks of a large number of other corporations creating such a comparatively vast capitalization and influence. Such unification, unexplained, justifies a presumption of an intent to dominate and control the towing facilities. Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. The fact that the policy of the Towing Company's promoters was to buy out competitors, rather than to buy new tugs, and by competition compel the loss to other tug owners of their property, does not tend to negative an intent to create a monopoly. Such course, as avoiding expensive competition, was entirely consistent with an intent exclusively to occupy the field. A wicked purpose to wreck the property and business of those men engaged in towing is not essential to a violation of the statute."

See also

United States v. Southern Pacific Co. et al., 259 U. S. 214;

Aluminum Co. of America v. Federal Trade Commission, 284 Fed. 401.

Citations will no doubt be produced of numbers of instances where purchasers of businesses and the good

will appurtenant thereto have been protected against competition from the sellers thereof. We recognize that it has been declared to be the policy of the law to protect a purchaser in his interests, but we most emphatically insist that this can only be done within proper and reasonable limits, and the Courts will not permit restraints to go beyond the spirit and intent of those statutes which are designed to curb the practice. There are no indications known to us that the Courts, whenever the matter has come under their consideration, have shown any disposition to wink at violations of the Federal statutes prohibiting unreasonable restrains and the suppression of competition, particularly when such statutes are clearly operative within a territory and no question of interstate commerce is involved. We believe that this record presents a case of conspiracy to kill off competition within a certain field of business activity in the Territory of Alaska, and to concentrate the whole of that business in the hands of one foreign corporation. As a prominent incident to the illegal plan, this complainant has exacted a contract from this defendant, purporting to compel him to desist from any manner of competition with their monopoly, even to the extent of depriving him of a means of earning his living, the pursuit of which is not in any way shown to injure the complainant. The temporary injunction sustains the whole design, and substantially operates to deprive this defendant of the privilege of even acting as an airplane pilot in Alaska.

CONCLUSION.

For the reasons set forth above, we ask this Court to dissolve the temporary injunction. We sincerely believe that there is no escape from the conclusion that the terms of the contract involved herein, the breach of which is sought to be prevented by the injunction, are void and unenforceable by any Court in favor of the complainant, not only for the reason that such complainant is impotent and has not the capacity to demand the relief which it seeks, but also for the reason that the provisions of the contract relied upon by the complainant are unjust, unfair, and illegal.

Dated, San Francisco,
May 17, 1930.

Respectfully submitted,
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No. 6116

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RALPH WIEN,
Appellant,

vs.

ALASKAN AIRWAYS INC. (a corporation),
Appellee.

BRIEF FOR APPELLEE.

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No. 6116

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RALPH WIEN,
Appellant,

vs.

ALASKAN AIRWAYS INC. (a corporation),
Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from an order of the District Court for the Territory of Alaska, Fourth Division, granting the plaintiff (appellee) a temporary injunction against the defendant (appellant).

The motion for injunction was based upon the verified complaint of the plaintiff (Tr. pp. 1-14), and the affidavit of Charles L. Thompson. (Tr. pp. 25-28.) The defendant (appellant) presented in opposition to the motion his affidavit entitled "Resistance to Motion to Show Cause." (Tr. pp. 28-32.) No other evidence was offered by either party, except that at the hearing of the motion it was stipulated that the portion of appellant's affidavit setting forth that the contract upon which the action was based was entered

into by the plaintiff (appellee) for the purpose and with the effect of creating a monopoly, should be deemed denied by the plaintiff "to the same effect as if such denial of such portion had been made in writing by proper affidavit." (Tr. p. 25.)

The complaint alleges that the plaintiff, Alaskan Airways, Inc. was a corporation organized and existing under the laws of the State of Delaware, for the purpose of engaging in the business of transportation in intrastate and interstate and foreign commerce, by aircraft, of passengers and freight of every nature and description; that plaintiff is engaged in such business in Alaska with an office at Fairbanks; that it has paid its annual license fee to the Territory of Alaska and has complied with all of the laws, rules and regulations of the Territory of Alaska pertaining to foreign corporations. It alleges further that prior to August 6, 1929, the defendant Wien was a stockholder and an active member of Wien Alaska Airways, Inc., an Alaska corporation engaged in the transportation of passengers and freight by aircraft in the Territory of Alaska; that said Wien was employed by Wien Alaska Airways, Inc. as mechanic and also took an active part in the general management of said company. It appears further from the complaint that on August 6, 1929, the plaintiff, Alaskan Airways, Inc., purchased all the property, assets and business of Wien Alaska Airways, Inc. and all of the right, title and interest of the said Ralph Wien therein, together with the good will of the business of said corporation, except cash on hand and accounts receivable, for a consideration

of $65,000.00. The property so purchased other than good will was of a value of $40,000.00 and the balance of said purchase price (i. e. $25,000.00) was paid in consideration of the good will of said company and of the individual stockholders thereof, including the defendant Ralph Wien, and of the promises and agreements of said stockholders, including Wien, made with the plaintiff, that the said parties, including Wien, would not for three years from August 6, 1929, enter into competition with the plaintiff and would not enter into any business or have any interest in any other company or partnership that would in any way compete with the plaintiff in such business, and the said parties, including Wien, further agreed as part of the consideration for such purchase price that he would not during such period of three years accept any employment with any airplane company, corporation, or association, or individual, engaged in any business that would in any way compete with the business of plaintiff. The agreement, including the covenants referred to, was in writing and a copy thereof, marked "Exhibit A," is attached to the complaint. (Tr. pp. 7-11.) The complaint alleges that notwithstanding these promises, agreements and covenants the said defendant Ralph Wien, on or about January 10, 1930, entered into the employ of and associated himself with a firm doing business at Fairbanks, Alaska, and carrying on a general transportation of passengers and freight between points in Alaska, and that ever since said 10th day of January, 1930, the said Ralph Wien has been engaged as aviator and pilot of an airplane for said firm and in

violation of his promises and agreements continues to carry on the business of commercial flying in active competition with the business of the plaintiff. On or about January 20, 1930, the plaintiff notified Wien in writing of his violation of the agreement and demanded that he cease such violation and competition, but said defendant, notwithstanding, continues to act as aviator and flyer for said firm and to violate the promises, covenants and provisions of said agreement. There are the usual allegations of irreparable damage if the defendant be not restrained and an averment that he is not financially able to respond to a judgment for damages.

The affidavit of Charles L. Thompson (Tr. pp. 25-28) supports the material allegations of the complaint, including the averment that the defendant Wien is not financially able to respond in damages.

The affidavit of Ralph Wien does not deny any of the allegations of the plaintiff's complaint or of the affidavit of Thompson, except the allegation that defendant is not financially able to respond to a judgment for damages. There is, therefore, no dispute regarding the corporate capacity of the plaintiff; the existence and status on August 6, 1929 of Wien Alaska Airways, Inc.; the relation of the defendant Wien to the last named corporation; the purchase by plaintiff on August 6, 1929 of all the property, assets and business of Wien Alaska Airways and all of the right, title and interest of the defendant Wien therein; of the payment for such property, business and assets of Wien Alaska Airways, Inc. and of Wien

of the purchase price of $65,000.00; that $25,000.00 of this sum was paid for the good will of the company and of its stockholders, including Wien, and of their covenants and agreements not to enter into competition with the plaintiff for a period of three years; that notwithstanding these agreements the defendant Wien, after receiving such consideration, entered into business with associates in competition with the plaintiff and in defiance and in violation of his covenant not to do so. It may also be pointed out that Wien's affidavit in resistence to the application for temporary injunction alleges that when the contract of sale was made on August 6, 1929, all of the stock of Wien Alaska Airways, Inc. was owned and held by the appellant and the two other persons who had signed the agreement as individuals, and that Wien, with the two other prior owners of such stock, immediately thereafter dissolved said Wien Alaska Airways, Inc. (Tr. pp. 31-32.)

There was, therefore, no attempt on the part of the defendant to question any of the allegations of fact (other than his own want of financial responsibility) upon which the plaintiff asserted its right to an injunction to restrain the further violation of the agreement admitted to have been made with it. The affidavit of Wien attempts merely to set up affirmative matter designed to show that the plaintiff was precluded from resorting to the court for the relief to which it was otherwise clearly entitled for two alleged reasons:

(a) That it had failed, prior to the making of the contract of August 6, 1929, to file the statements and

other papers and to pay the taxes and fees required under the Alaskan code of foreign corporations doing business in Alaska; and

(b) That its purchase of the assets and business of Wien Alaska Airways, Inc., and of its stockholders was made under a plan and purpose of creating in itself a monopoly of the business of transportation by air within the second, third and fourth divisions of the Territory of Alaska.

With reference to point (a), the averments of Wien's affidavit are in effect that plaintiff filed a copy of its charter or articles of incorporation, its designation of an agent for service of process in Alaska and its financial statement in the office of the Clerk of the District Court for the Fourth Division on September 12, 1929, and not before; that it filed a copy of such papers in the office of the auditor of the Territory of Alaska on the 22nd day of October, 1929, and not before; and that it paid the corporation tax and other fees required by law of foreign corporations doing business within Alaska on the 22nd day of October, 1929, and not before; that on August 1, 1929, the plaintiff purchased all the property, good will and business of Bennett-Rodebaugh Airplane Company, a corporation doing business as a common carrier through the air in the transportation of passengers and freight in the Territory of Alaska and between the first day of August and the 6th day of August, 1929 (the latter being the date of the purchase from Wien Alaska Airways Inc., and its stockholders) the plaintiff was engaged as a common carrier in doing an airplane business transporting passengers and

freight by air between points in the Territory of Alaska, and plaintiff continued at all times after the first day of August, 1928, to do business in the Territory and held itself out to the public as being a common carrier in that business.

With respect to point (b), the statements contained in the affidavit are that when plaintiff made his contract with Wien Alaska Airways, Inc., and its stockholders, it had already purchased the property and business of Bennett-Rodebaugh Airplane Company and had already arranged to purchase the property and business of another corporation engaged in a similar line of business; that the only transportation by air within the Second, Third and Fourth Divisions of Alaska on the 5th day of August, 1929, was that furnished by the three companies referred to. The affidavit further states that plaintiff purchased said Bennet-Rodebaugh Airplane Company and entered into the contract set forth in the complaint and purchased the business, goodwill and property of the third company during the month of August, 1929, pursuant to a general plan to purchase all of said companies and to thereby eliminate all competition and create a monopoly in itself.

The only questions raised by appellant on its appeal are these:

1. Was the contract here sought to be enforced absolutely void, and was the appellee disabled to use for its enforcement because the contract was entered into before the appellee had performed the various acts required by the law of Alaska to qualify it to do business in that Territory, although all of these acts

were performed before the action was commenced? and

2. Was the contract sought to be enforced in violation of the Federal statutes forbidding undue and unreasonable restraint of trade? (Ap. Br. p. 4.)

ARGUMENT.

I.

UNDER THE LAW OF ALASKA THE CONTRACT OF AUGUST 6, 1929, WAS NOT VOID, BUT AT MOST VOIDABLE. IT IS ENFORCEABLE AGAINST THE APPELLANT, WHO HAS NOT DISAFFIRMED IT, AND RETAINS THE CONSIDERATION.

The appellant, in the portion of his brief directed to the support of the claim that the contract of August 6, 1929, was absolutely void and enforcible, sets forth some of the provisions of Chapter Twenty-three of the Complied Laws of the Territory of Alaska (1913) entitled "Of Foreign Corporations." The brief dwells particularly upon the last section of this chapter. (Section 660.) There is, however, no reference in the brief to Section 657, which, as we contend, is the section applicable to this case.

Chapter Twenty-three contains seven sections (654-660 inclusive) and it will, we think, aid the court in its consideration if we here set forth or summarize the various sections of the chapter in their order. Some of them have been amended since the publication of the Compiled Laws of 1913, and we shall indicate the nature of the amendments as we proceed:

Section 654 prohibits corporations organized under the laws of the United States or of any state or terri-

tory of the United States other than Alaska, or the laws of any foreign country, from doing or engaging in business within the Territory of Alaska without first having filed in the office of the Secretary of the Territory and the office of the Clerk of the District Court for the division in which it intends to engage in business, an authenticated copy of its charter or articles of incorporation, a verified statement showing its name, the location of its principal place of business without and within the Territory, the amount of its capital stock, the amount thereof paid in in money and the amount paid in otherwise; the amount, value and character of its assets and the amount of its liabilities, together with a certificate consenting to be sued in the court of the Territory and designating an agent resident in the Territory upon whom service may be made.

This section was amended in 1923 (Chapter 69, Session Laws of Alaska, 1923) but the changes from the original form as compiled in 1913 are not material to any question arising on this appeal. The amended section is set forth substantially in full at pages 9 and 10 of appellant's brief.

Section 655 requires the filing of the written consent of the person designated to act as agent for service of process.

Section 656 defines the procedure in case of the death, removal or disqualification of the designated agent or the revocation of his consent.

Section 657 which, we submit, is of primary importance in this inquiry, reads as follows:

> "If any such corporation or company shall attempt or commence to do business in the district without having first filed said statements, certificates and consents required by this Chapter, it shall forfeit the sum of $25.00 for every day it shall so neglect to file the same; *and every contract made by such corporation or any agent or agents thereof during the time it shall so neglect to file such statements, certificates or consents shall be voidable at the election of the other party thereto.* It shall be the duty of the United States attorney for the District to sue for and recover, in the name of the United States, the penalty above provided, and the same, when so recovered, shall be paid into the Treasury of the United States." (Italics ours.)

Section 658 requires every such corporation or company to make an annual report containing the information required in Section 654 and to file the same and a duplicate thereof.

Section 659 allows a period of 90 days after the effective date of the Act for corporations theretofore engaged in business to comply with its provisions.

The chapter ends with Section 660, which we here repeat.

> "If any corporation or company shall fail to comply with any of the provisions of this Chapter, all contracts made by such corporation or company with residents of the Territory of Alaska made in the Territory shall be void as to the corporation or company, and no court of the Territory shall enforce the same in favor of the corporation or company."

Section 660 was also amended in 1923. The change has no bearing on the present question. Prior to 1923 the section read:

> "If any such corporation or company shall fail to comply with any of the provisions of this Chapter, all its contracts with citizens of the District shall be void as to the corporation or company and no court of the District, or of the United States shall enforce the same in favor of the corporation or company so failing."

Statutes prescribing the conditions upon which corporations may do business within a jurisdiction other than that of their organization are practically universal, and there have been innumerable decisions interpreting such statutes and declaring the effect of a failure to comply with the conditions imposed, or of a delay in compliance. It would be of small aid to attempt to review the great mass of authority, since the statutes of the different states vary greatly and the conclusion reached depends largely upon the language of the particular enactment under consideration.

> "The effect of these statutes forbidding corporations from doing business in the state, except on compliance with their terms, depends necessarily on the wording and the construction of such enactments. However, the statutes of some of the states, according to the holdings of the courts thereunder, do not make contracts entered into without complying with their provisions, absolutely void. And the prevailing rule is, in the absence of expressed statutory provisions, that contracts of foreign corporations which have not

> complied with the requirements permitting them to do business in the state are valid and enforceable. * * * Very generally the right to enforce the contract is allowed where there has been a compliance with the statutory requirements before commencement of the suit to enforce the contract." (8 *Thomp. Corp.* (3d Ed.), Section 6659.)

On the other hand, there are many cases holding that where the statute expressly or by necessary implication declares that contracts made without compliance with the requirements are void or cannot be enforced, the corporation cannot maintain an action for relief under the contract. (8 *Thomp. Corp.* (3d Ed.) Section 6662.)

> Again, "The statutes of some of the states prohibit in express terms or by clear implication a foreign corporation from maintaining any action in the courts of the state until it has complied with the provisions prescribing the conditions on which such a corporation shall do business in the state. These statutes do not affect the validity of contracts made in the state by a foreign corporation which had not complied with the provisions, but suspend the remedy and prevent any action on any such contract until compliance." (8 *Thomp. Corp.* (3d Ed.) Section 6664.)

If Section 660 of the Compiled Laws of Alaska stood alone—if it were the only provision of Chapter Twenty-three relating to failure or delay in compliance with the conditions imposed on foreign corporations doing business in Alaska—it might well be argued that a contract made by such a corporation

with a resident of the Territory was absolutely void and that subsequent compliance would not cure the neglect of the corporation to meet the conditions before entering into the contract. It may be remarked, parenthetically, that authority is not lacking to support the conclusion that even under a statute like Section 660, compliance with the conditions prior to the institution of the action will entitle the corporation to maintain a suit on the contract thus made. It will be noted that Section 660 does not declare that the contract "shall be void," but that it "shall be void *as to the corporation or company*, and no court of the Territory shall enforce the same in favor of the corporation or company." An Oklahoma statute, in substantially identical terms, (i. e. "shall be void as to the corporation and no court of the state shall enforce the same in favor of the corporation") was considered by the Supreme Court of that state in *M. S. Cohn Gravel Co. v. Southern Surety Co.*, 264 Pac. 206. The court said:

> "The words 'void' and "voidable' are frequently used indiscriminately * * *. Had Section 5435 concluded by saying that such contracts 'shall be void' without adding 'as to the corporation' there could have been no doubt that the legislature meant that such contracts would in legal effect be nullities and no right could grow out of them. This latter expression 'as to the corporation,' limits and restricts the meaning of the word 'void' so that it has no application in its correct meaning as to such contracts so far as the rights of citizens of the state which may arise thereunder are concerned. The legislature hav-

> ing specified against whom such contracts should be void, there is no room for the contention that they should be void as to any other party. This presents the exact situation of a voidable contract."

See also *Mutual Benefit Life Ins. Co. v. Winne* (Mont.), 49 Pac. 446, where Honorable Wm. H. Hunt, then a justice of the Supreme Court of Montana, gave elaborate consideration to a similar statute and concluded that the word "void," when coupled with the words "as to such incorporation" was to be interpreted as meaning "voidable" rather than as utterly void and nugatory.

But we are not required in this case to make a contention based on Section 660 as if that section stood by itself. Section 657 is a part of the same chapter, and must under the most elementary rules of statutory interpretation, be considered with the other parts of the chapter. It is not to be supposed that the legislature in enacting these two sections intended that either should be ineffectual or that one should destroy the other. If they can reasonably be read so as to give them harmonious effect, and to make each operative within its proper scope, they should be so interpreted.

We submit that the fair construction of the two sections is that they deal with two different situations. Section 657 applies to the case of a corporation which has complied with the statutory requirements, but has neglected such compliance until after it has commenced to do business in the Territory and

has undertaken to make contracts therein. Section 660 has to do with the case of a corporation which has never performed the conditions imposed by the statute. In the former case the corporation which attempts to do business before compliance is subject to a fine of $25.00 for each day of its neglect to file the required papers, and every contract made by it during the period of such neglect, is made *"voidable at the election of the other party thereto."* This clearly has reference to the case, not of a corporation which never files, but of a corporation which has filed too late. Its neglect or delay is punished by a fine and by the further penalty of having its contracts subject to avoidance at the election of the other party, but not by having such contracts made absolutely void and of no effect. Section 660, however, has to do with a corporation which shall "fail to comply with any of the provisions of this Chapter." Contracts made by such a corporation, i. e., by one which has completely ignored and set at defiance the laws of the Territory is made void as to the corporation and the courts of the Territory are forbidden to enforce the same in its favor.

The interpretation for which we contend has the support of the only decision of the Alaskan courts in which the question was directly presented and adjudicated. That case (*Ames v. Kruzner*, 1 Alaska 598) is not referred to in appellant's brief. It is direct authority in favor of the appellee and has stood unquestioned since 1902, the year of its rendition. As we shall show, no one of the other Alaskan cases cited by appellant is in point. In none of them was Sec-

tion 657 under consideration and the observations regarding Section 660 were in each instance unnecessary to the decision, and dicta.

In *Ames v. Kruzner,* a foreign corporation brought suit to foreclose a mortgage. The defense was based on the fact that the corporation had not qualified under the laws of Alaska until four days after the making of the note and the delivery of the mortgage. The court, after setting forth the two sections now in question (as they then read) said:

> "The defendants received the consideration for the note and the defense has no merit except the technical wording of the statute upon which they pleaded * * *. A graduated series of penalties is imposed in case of their failure to comply with the law in these respects * * *. The real distinction between these two sections is seen in comparing the penal clause against the enforcement of contracts (Here Section 657 under the earlier number of 228 is set forth). I understand this section to mean that a contract made by any person on October 15th with a foreign corporation which did not file its statements, certificates and consent until October 20th, and which came to suit subsequent to that date, is voidable at the election of the other party thereto. It is not void but only voidable * * *. Section 231 (now numbered 660), however, has but one object, viz.: it is a withdrawal of all jurisdiction in the the court to enforce in favor of the corporation a contract falling within its terms. I understand it to mean that a contract made by any person, say on October 16, 1900, with a foreign corporation which wholly failed thereafter to comply with the law, cannot be enforced by the court

> in favor of the corporation for want of jurisdiction of the court. The contract strictly speaking is not void but only voidable when considered from the standpoint of the other party * * *.
>
> "It follows * * * that in the case at bar the contract note sued upon is, as against the corporation, only voidable under Section 228 and not void under Section 231. The court has jurisdiction to enforce the contract unless it is voided in its judgment."

This view not only gives effect and meaning to both sections, but it is in accord with the general policy of the law against forfeitures. As this court said in *Ross-Higgins Co. v. Protzman,* 278 Fed. 699, 702, "the section (660) should be construed with reasonable strictness," meaning, as the context shows, that it should be construed so as to prevent the forfeiture of the right claimed by the corporation. Here the appellant insists upon the broadest and most sweeping construction of Section 660, and a construction which would make the section destructive of the provisions of Section 657 in every case where a resident of Alaska entered into a contract with a foreign corporation.

As we have said, none of the three Alaskan cases cited by appellant at pages 13 to 15 of its brief decides or attempts to decide that a contract by a corporation which has performed the statutory conditions after the making of the contract, but before suit, is void.

In *Burr v. House,* 3 Alaska 641, the defendant, a foreign corporation, asserted a mechanic's lien for

materials used in the building of a house on the land claimed by plaintiff. The plaintiff sought to defeat the corporation's claim by pleading on information and belief its failure to comply with the statutes governing the qualification of foreign corporations. The court held that the failure to qualify, being a matter of public record, could not be pleaded on information and belief. The attempt to defeat the corporation's contention having failed on this ground, the court went on to make the remarks quoted at the bottom of page 13 of appellant's brief. The court had no occasion to define the precise provisions of the two Sections, 657 and 660, and the general language quoted would not support the appellant's present position, even if it had been necessary to the decision.

In re Craig Lumber Co., 6 Alaska 656, was a case in which two foreign corporations claimed as creditors in a bankruptcy proceeding. One of them attacked the ruling of the referee that the other had an enforceable claim. It was sought to attack this holding on the ground that the prevailing creditor had not qualified under the statute and that its contract was therefore void under Section 660. The ruling was that Section 660 had no application, since it dealt only with contracts made with citizens of Alaska and the objecting corporation was not such a citizen. This was the sole basis of the decision and it was sufficient to dispose of the controversy. The question of the status of a foreign corporation which had fulfilled the requirements of the statutes after entering into a contract was not before the court and was not considered.

In *Alaska Siberian Navigation Co. v. Polet,* 7 Alaska, 354, the plaintiff, a foreign corporation, had brought an action upon a guaranty. A general demurrer was sustained on grounds based on the statute of frauds. The court went on with some expressions, obiter, calling the attention of the plaintiff to the fact that if it should plead over, attention should be given to the necessity or propriety of pleading compliance with the statutes requiring filing of papers by foreign corporations. The language of the court is not that quoted on page 14 of appellant's brief, which appears to be taken from the syllabus rather than from the opinion. At any rate the court did not attempt to construe Sections 657 and 660. It merely quoted Section 660 and expressed the view (which is in itself questionable), that a foreign corporation suing on a contract must allege affirmatively its compliance with the statutory conditions.

The two cases in this court, cited by appellant at page 15, do not support his contention. On the contrary they are rather in favor of the appellee. *Cobb v. McDonald-Weist Logging Co.,* 278 Fed. 165, was similar to *In re Craig Lumber Co.,* supra. It was a controversy between two corporations claiming as creditors of a bankrupt. Both were Washington corporations. The court held that since neither was a citizen of Alaska, Section 660 had no application. It does not appear that the corporation whose claim was attacked had ever made the necessary filings. Similarly in *Ross-Higgins Co. v. Protzman,* 278 Fed. 699, Section 660 was held to be inapplicable because it did not appear that the contract attacked was made

with a citizen of the District. In this case it appeared that the corporation in question had never complied with the provisions of the Alaskan law relating to foreign corporations.

If the contract is merely "voidable at the election of the other party thereto," as declared in Section 657, it is perfectly clear that the appellant has not exercised his election to avoid or disaffirm the contract, but on the contrary has affirmed it and retained the benefits which he received under it.

The agreement was made the 6th day of August, 1929, and the purchase price of $65,000.00 was paid at that time. (Tr. pp. 2-3.) $25,000.00 of this amount was paid in consideration of the good will of the Wien Alaska Airways, Inc., and of its stockholders, and of the covenants of such stockholders not to enter into competition with the plaintiff for a period of three years. (Tr. p. 3.) Plaintiff had then performed everything which it was required to perform under the agreement. All of the stock of the selling corporation was owned by the appellant and two others, and immediately after the execution of the contract the three dissolved Wien Alaska Airways, Inc., (Tr. pp. 31-32) and presumably distributed among themselves the purchase moneys received from the plaintiff. The selling corporation thus passed out of the picture, and the money paid for the physical assets, for the good will of the corporation and its stockholders and for the covenant not to engage in a competing business for a limited time, went into the pockets of the three stockholders who were the real parties in interest. Nothing was done by the appel-

lant to restore any part of the consideration received by him or to question or disaffirm the contract which he had made, until after this action was brought. He retained the money which he had received in payment for his covenant not to compete with the purchaser of his good will, and about five months after making the agreement simply proceeded to violate it. (Rep. Tr. p. 4.) When the plaintiff, at the end of January, 1930, brought this action for equitable relief against such violation, the defendant still made no offer to restore the consideration or disaffirm the contract, but took the position that the agreement was void, and that he could break it, still retaining the money that had been paid him.

The untenability of appellant's position in this respect is, we think, sufficiently demonstrated by quoting the language of this court in *Cobb v. McDonald-Weist Logging Co.*, supra, 278 Fed. at page 167:

> "The provision of Section 657, making every contract entered into by any foreign corporation or company, or by any agent or agents thereof, without having first filed the required statements, certificates, and consents, 'voidable at the election of the other party thereto' is also plainly inapplicable to the present case, for the reason, not only that it does not appear that the bankrupt corporation ever elected to treat the contract it made with the appellee as void, but, on the contrary, it affirmatively appears from the record that it accepted the benefit of the contract to a large extent."

II.

THERE IS NO SHOWING THAT THE CONTRACT IS IN VIOLATION OF THE FEDERAL STATUTES DEALING WITH RESTRAINT OF TRADE.

That the contract, considered by itself, was a perfectly legitimate and valid one, does not appear to be seriously disputed by the appellant. The transaction between the parties was simply one by which the plaintiff (appellee) acquired the business and assets of Wien Alaska Airways, Inc., and the good will of said corporation and its stockholders, with the accompanying covenants of the selling company and its stockholders not to compete with the plaintiff in the Territory of Alaska for a period of three years.

> "It is well settled that the sale of a business, and the surrender of the good will pertaining to that business, and an agreement thereunder, within reasonable limitations as to time and territory, not to enter into competition with the purchaser, when made as part of the sale of the business, and not as a device to control commerce, is not within the Federal anti-trust law. United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 329, 17 Sup. Ct. 540, 41 L. Ed. 1007; United States v. Joint Traffic Ass'n, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; Bement v. National Harrow Co., 186 U. S. 70, 92, 22 Sup. Ct. 747, 46 L. Ed. 1058; Cincinnati Packet Co. v. Bay, 200 U. S. 179, 185, 26 Sup. Ct. 208, 50 L. Ed. 428; Fisheries Co. v. Lennen (C. C.), 116 Fed. 217; Davis v. A. Booth & Co. (6th Circuit), 131 Fed. 31, 65 C. C. A. 269."
>
> *Darius Cole Transportation Co. v. White Star Line,* 186 Fed. 63, 65.

See, also,

Camors-McConnell Co. v. McConnell, 140 Fed. 412;

Lumbermen's Trust Co. v. Title Ins. & Inv. Co., 248 Fed. 212.

It cannot be claimed that the restrictions imposed upon the appellant and his associates by their agreement were in any way unreasonable, or more extensive than was necessary to protect the purchaser in the enjoyment of the good will of the business which it had bought—a good will for which it paid $25,000.00. The territory to which the restriction applied was limited to that within which the business of appellee was to be carried on, i. e. the Territory of Alaska. The duration of the restriction was limited to a term of three years. There is therefore no basis for a contention that the restraint on the sellers was "greater than necessary to afford fair protection to the legitimate interests of the purchaser," as was the case in *United States v. Great Lakes Towing Co.,* 208 Fed. 733, 742.

The appellant attempted, by his affidavit entitled "Resistance to Motion to Show Cause" (Tr. p. 28), to show that the contract of purchase here in question was part of a scheme or plan of appellee to acquire a monopoly of the business of airplane transportation in Alaska. There are two simple answers to the appellant's contentions in this regard.

(a) It was stipulated at the hearing (Tr. p. 25) that the portion of appellant's affidavit setting forth that the contract was entered into by the plaintiff for

the purpose and with the effect of creating a monopoly of the airplane business in Alaska should be deemed denied by plaintiff to the same effect as if such denial had been made by proper affidavit. There was therefore a direct issue of fact on this point, and the action of the trial court in accepting the appellee's evidence rather than that of appellant was a proper exercise of its judicial discretion.

(b) The specific facts set up in appellant's affidavit do not on their face show that the contemplated acquisition by appellee of the business of three airplane companies had any tendency to limit competition or to restrain trade. The affidavit sets forth that on August 1, 1929, the plaintiff purchased the property, good will and business of Bennett-Rodebaugh Airplane Co., doing a business as common carrier in air transportation in Alaska; that on August 6th it purchased the business of Wien Alaska Airways, Inc.; that on the last named date it had arranged to purchase the business of Anchorage Air Transportation Corporation, doing a like business in Alaska, and that on August 5, 1929, these three corporations were the only ones engaged in air transportation business in Alaska. For all that the affidavit shows, the three companies may have been operating over entirely separate routes and may not have been competing in any way. As Mr. Justice Holmes said in *Cincinnati Packet Co. v. Bay,* 200 U. S. 179, 50 L. Ed. 428:

> "A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts."

In its argument on the supposed violation of the Federal Statutes regarding restraints of trade the appellant (Br. p. 31) cites the provision of the Clayton Act prohibiting a corporation engaged in commerce from acquiring the stock of another corporation engaged in commerce where the effect is to lessen competition between the two. (*U. S. Code,* Title 15, p. 220.) As we have just pointed out, the appellant has made no showing that competition would be lessened. But, regardless of this consideration, the section deals with the purchase of the stock of one corporation by another corporation. There was no purchase by appellee of any part of the stock of Wien Alaska Airways, Inc. It purchased the assets and business of the corporation itself. The section cited obviously has no application whatever.

Finally, with respect to appellant's attack based upon the Sherman Act and the Clayton Act, we quote as particularly applicable, the language of this court in *Lumbermen's Trust Co. v. Title Ins. & Inv. Co.,* supra, at page 220:

> "The attack upon the legality of these contracts comes, not from the public, or from any one who claims to have been injured thereby, but from parties who deliberately entered into them. Before such contracting parties can be absolved from their solemn obligations, it must be shown that their agreements are clearly and manifestly injurious to the interest of the public. 'It has been clearly recognized in recent times that public policy is at least as much concerned in holding persons to their contracts as in prohibiting contracts in restraint of trade.' Joyce on

Monopolies, sec. 94. In Printing and N. R. Co. v. Sampson, L. R. 19 Eq., 462, 465, it was said:

"'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.'"

III.

THE ACTION OF THE TRIAL COURT IN GRANTING A TEMPORARY INJUNCTION SHOULD BE AFFIRMED ON APPEAL, EVEN THOUGH THERE BE DOUBT AS TO THE LAW OR THE FACTS, UNLESS THERE HAS BEEN A MANIFEST ABUSE OF DISCRETION.

"It would be superfluous to cite authorities to show that the granting or refusing of a preliminary injunction is a matter resting largely in the discretion of the trial court. Where there is a substantial conflict in the evidence regarding an issue which may affect the discretion of the court in passing upon the application for such injunction the order made will not on appeal be overthrown merely because there may be considerable or even preponderating evidence, which, if believed, would have led to a contrary conclusion. The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respec-

> tive equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the rights claimed by him. When the cause is finally tried, it may be found that the facts require a decision against the party prevailing on the preliminary application."
>
> *Miller & Lux v. Madera C. & I. Co.,* 155 Cal. 59, 62-3.

The rule declared in the California case just cited has been frequently applied in the Federal courts, it being held that the action of the trial court should be sustained, not merely where there is doubt as to the facts, but, as well, where there may be uncertainty regarding questions of law.

In *Massie v. Buck,* 128 Fed. 27, 31, the Circuit Court of Appeals for the Fifth Circuit said:

> "To what extent ought this court go into an examination of the merits of a case on an appeal from an interlocutory order granting a temporary injunction? Unless there is some strong reason for it, we ought not to decide the merits of the case before they have been decided by the lower court. The granting or withholding of a preliminary injunction is in the sound judicial discretion of the Circuit Court. We ought not to interfere with the exercise of that discretion, unless it clearly appears that the court has erred under the established legal principles which should have guided it. Clearly, the propriety of its action should be considered from the standpoint of the Circuit Court. When a bill is presented asserting claims that raise grave questions of law, and which the court must decide before

rendering a final decree, it is within the sound judicial discretion of the court to preserve the existing status until the case is finally decided, whenever that course is necessary to fully protect the plaintiff."

To the same effect are:

Lehman v. Graham, 135 Fed. 39;

McConnell v. Camors-McConnell Co., 140 Fed. 987.

In the case at bar the court below granted the plaintiff a temporary injunction restraining the defendant (appellant) from violating a contract admittedly made by him on a valuable consideration which he had received and retained. It appeared that the plaintiff was without an adequate remedy at law and that equitable relief was necessary for its protection. The order granting the temporary injunction merely preserved the existing status until there could be a trial and a hearing on the merits. The defendant (appellant) is protected by an injunction bond. (Tr. pp. 21-23.) The defendant in the court below (appellant) raised no issue regarding any of the allegations of plaintiff's bill. The equities are not denied. The appellant merely relied upon claims, which at best are doubtful, that the plaintiff was incapacitated to maintain the action because of its alleged delinquencies in matters not connected with the contract sued upon. We submit that even if this court should feel that there is some question regarding the ultimate merits of the case, it should not at this time go into an examination of the doubtful

questions presented but should leave them for decision by the lower court.

CONCLUSION.

Appellee respectfully submits that the order granting a temporary injunction should be affirmed for the reasons hereinabove set forth, i. e.:

(1) The plaintiff's delay in qualifying under the Alaskan law did not render the contract void; on the contrary the contract was merely voidable and subject to disaffirmance by the appellant, who did not disaffirm it.

(2) The record does not support the claim that the contract violates any Federal statute governing agreements in restraint of trade.

(3) The order granting a temporary injunction gives the appellee protection which it is entitled to retain until a hearing on the merits can be had and any questions of law and fact can be fully and fairly presented to the lower court and determined by it.

Dated, San Francisco,
June 14, 1930.

Respectfully submitted,
JOHN A. CLARK,
CHARLES E. TAYLOR,
M. C. SLOSS,
L. S. ACKERMAN,
Attorneys for Appellee.

No. 6116

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RALPH WIEN,
Appellant,

vs.

ALASKAN AIRWAYS INC. (a corporation),
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

HARRY E. PRATT,
LOUIS K. PRATT,
Fairbanks, Alaska,
HERMAN WEINBERGER,
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Attorneys for Appellant and Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

No. 6116

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RALPH WIEN,
Appellant,

vs.

ALASKAN AIRWAYS INC. (a corporation),
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorables Frank H. Rudkin, Frank S. Dietrich, and Curtis D. Wilbur, Circuit Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

I.

INTRODUCTION.

We respectfully ask the Court for a rehearing of this cause and a reconsideration of that part of its decision which declares that under the provisions of *Sections 657* and *660* of the Compiled Laws of Alaska the contract in question is only voidable and can be enforced in favor of the corporation by the Courts of the Territory.

The part of the opinion to which we have reference is as follows:

"Without unduly straining the text, it is thought the two (Sections 657 and 660) may be harmonized and each given effect by assuming that Section 657 was intended to apply to a case where, as here, the corporation, though in default at the time the contract was made, later complies with the law; and Section 660, to a case where the corporation wholly fails to comply."

II.

WHEN A CONTRACT IS MADE IN THE TERRITORY WITH A RESIDENT THEREOF PRIOR TO A COMPLIANCE WITH THE PROVISIONS OF THE CHAPTER, SECTION 660 APPLIES AND THE CONTRACT CANNOT BE ENFORCED BY THE COURTS IN FAVOR OF THE CORPORATION.

We are convinced that the Court has overlooked not only the principal intent and purpose of *Section 660,* but also a distinguishing fact in existence in this case. The admitted fact is that the contract was made in Alaska with a resident thereof prior to a compliance by the foreign corporation with *any* of the provisions of Chapter 23.

With respect to *Section 657,* the Court apparently holds that not only may the other party to the contract enforce it or cancel it by formal rescission, but also that the corporation may enforce it provided it qualifies before commencing suit. If *Section 657* stood alone, or was the only provision on the subject, there might be some basis for this interpretation. However, as the Court admits, both sections must be construed together and both given the full effect according to the intent therein expressed. We cannot

escape the conclusion that the Court's decision wholly disregards the principal purpose of *Section 660.*

We maintain that it is most obvious that *Section 660* was intended to supplement *Section 657.* The outstanding feature of *Section 660* is its treatment of contracts made *"with residents of the Territory of Alaska, made in the Territory."* No such clause appears in *Section 657.* Therefore, *Section 660* was meant as a qualification of *Section 657.*

That qualification consists of the statutory intent as expressed in *Section 660* to protect *residents of the Territory* from the enforcement against them of contracts made with them in the Territory by foreign corporations which attempt to make those contracts without first qualifying to do business. The imposition of this condition has been so plainly recognized by not only the Courts of Alaska, but also this Court, that it is quite impossible to disregard it when all of the requisite facts exist calling for its application.

In our opening brief we called attention to certain authorities which the Court in the decision at bar disregarded for the avowed reason that the question before us here is not, in those cases, "directly involved or definitely discussed." While this may be true to a limited extent, nevertheless can it be safely said that if this exact question had been before the Court in those cases, the Court would have held that where a contract is made in the Territory, with a resident thereof, it can be enforced in favor of the

corporation so long as the corporation had qualified subsequent to the making of the contract and at any time up to the commencement of suit? Let us here take brief notice of what those cases declare with respect to the construction of *Section 660.*

Burr v. House, 3 Alaska 641, declares that compliance with the statute *is a condition precedent* to the right of a foreign corporation to do business within the Territory.

In re Craig Lumber Co., 6 Alaska 356, clearly recognizes the effect of the qualification contained in *Section 660* by announcing that the contract is void and the Court is enjoined not to enforce it in favor of the corporation "only where a foreign corporation which has failed to comply with the statutory requirements *deals with a citizen of Alaska.*" (Italics ours.)

Alaska-Siberian Navigation Co. v Polet, 7 Alaska 374, also observes the condition by holding that the failure of the foreign corporation to qualify "renders contracts *made with residents of the Territory, in the Territory,* void, and no Court of the Territory shall enforce the same in favor of the corporation." (Italics ours.)

And, likewise, this Court itself has heretofore fully recognized the force and effect of this particular provision of *Section 660* for in *Cobb v. McDonald-Weist Logging Co.,* 278 Fed. 165, it was expressly announced that *Section 660* has no application *where neither of the parties to the contract was a citizen of Alaska.*

And finally, in *Ross-Higgins Co. v. Protzman, et al.*, 278 Fed. 699, this Court unequivocally declared the force and effect of this particular provision when it said:

> "To adjudge a contract wholly void under Section 660 as to the corporation, *it must clearly appear that the contract was made with a citizen of the District.*" (Italics ours.)

It is not conceivable that this Court, in the last cited case, would have so definitely expressed its understanding and interpretation of *Section 660* if there could be any basis whatever for deciding that the contract can be enforced in favor of the corporation just so long as qualification takes place before commencement of suit.

The decision at bar wholly sets at naught the protection afforded to residents of the Territory by *Section 660.* Under this decision it will hereafter be possible for all foreign corporations doing business in Alaska to completely defy the laws of the Territory, make contracts there with residents thereof, and refrain from qualifying so long as no necessity ever exists for going into Court to enforce those contracts. Then, when such necessity arises, all that it is necessary for the corporation to do is to simply qualify before commencing suit. In other words, although it is the intent of the statute, *with respect to residents of the Territory,* to penalize the foreign corporation for making a contract when unqualified, rendering such contract absolutely void, nevertheless this decision removes that penalty entirely and permits a sub-

sequent qualification and enforcement of the contract against the resident.

We here call attention to the fact that *in 1923* the Territorial Legislature, without changing *Section 657* in any respect, amended *Section 660* by changing the clause *"with citizens of the District"* to read *"made by such corporation or company with residents of the Territory of Alaska, made in the Territory."* It is obvious that in adopting this amendment the Legislature had in mind mainly the protective feature of *Section 660* and intended to enlarge that protection to residents of the Territory so far as contracts made in the Territory are concerned, specifically designating what particular contracts made with that particular class of individuals shall be, not voidable, but void, as to the corporation and unenforcible by the Courts of the Territory in its favor. We do not believe that it could possibly be more clearly stated that when an unqualified foreign corporation makes a contract in Alaska with a resident thereof, the contract cannot, under any circumstances, be enforced in favor of the corporation.

In our opening brief herein we neither mentioned nor discussed the *Ames v. Kruzner* case. We felt, and still feel, convinced that that case has no force as an authority upon the question involved here. From an analysis of that decision and the decisions in the above mentioned Alaska cases, and the cases before this Court, we could not escape the conclusion that so far as the construction and interpretation of these statutes are concerned, it was entitled to no consideration whatever. The decision is in 1 Alaska,

and is the first reported decision of any Court of the Territory involving the provisions of Chapter 23 of the Compiled Laws. Although the questions therein considered have subsequently come before the Alaska Courts, and also before this Court, never once has the *Ames v. Kruzner* case been taken cognizance of, or even mentioned. We still feel certain that while it may be true the precise question involved here was not up for decision in those cases, nevertheless the Alaska Courts, and particularly this Court, did go to the extent of definitely announcing a construction and interpretation of *Section 660.* That construction and interpretation are wholly inconsistent with the rule announced in *Ames v. Kruzner,* and it is for this very reason that we originally concluded, and now maintain, that *Ames v. Kruzner* has been practically overruled so far as the construction of *Section 660* is concerned.

III.

THE DEFENDANT HERE HAS A COMPLETE DEFENSE TO THE ENFORCEMENT OF THE CONTRACT AGAINST HIM BY INVOKING THE PROVISIONS OF SECTION 660.

We respectfully urge the Court to give further consideration to the decision in *M. S. Cohn Gravel Co. v. Southern Surety Co.* (Okla.), 264 Pac. 206. That case is a direct authority upon the question involved here, because the statute under consideration there is almost identically the same as *Section 660.* Both the Oklahoma and the Alaska statutes are outgrowths of the same Congressional Act, which was in

effect in Oklahoma when it was a Territory, just as *Section 660* is now in effect in the Alaska Territory.

The Oklahoma Court holds that while the corporation may sue, provided that it has domesticated prior to commencing suit, nevertheless, under the statute, the defendant, the other party to the contract, provided he is a citizen of the State, has a perfect defense to that suit by invoking the statute. In this connection the Court says:

> "Under the latter section the corporation must domesticate before it can bring its suit, *and even then the citizen has a perfect defense against the enforcement of the contract by invoking the statute.* This construction fulfills the purpose of the statute and is in accord with many respectable authorities." (Italics ours.)

It will be noted that in the *Cohn* case, the foreign corporation was allowed to enforce the contract for the sole reason that the other party to the contract had stood upon it and sought redress thereunder, thus waiving the protection given him by the statute and estopping himself from invoking the same.

The holding in the *Cohn* case cannot be reconciled with *Ames v. Kruzner.* It is, however, perfectly consistent and in harmony with *Burr v. House, In re Craig Lumber Co., Alaska-Siberian Navigation Co. v. Polet, Cobb v. McDonald Weist Logging Co.,* and *Ross-Higgins v. Protzman,* (supra), on the precise question that is involved here, namely, the correct interpretation of the statutory provisions contained in *Section 660.*

IV.

WHETHER THE CONTRACT BE CONSIDERED VOID OR VOIDABLE, IT IS, UNDER THE FACTS BEFORE THE COURT, UNENFORCIBLE BY THE CORPORATION.

In the consideration of this question, too much importance can be attached to whether or not the contract involved is void or voidable. Confusion exists in some of the authorities by a too meticulous effort on the part of the Courts to define and distinguish the terms "void" and "voidable."

Where, as here, the true question is whether the contract is enforcible in favor of the corporation by any of the Courts of the Territory, it is only a matter of incidental interest as to whether or not the contract be regarded as void or voidable.

We call attention to the recent case of *Burroughs v. Southern Colonization Co.* (Ind.), 165 N. E. 763, where the Appellate Court, in deciding against the foreign corporation, held that the contract which it was seeking to enforce was void. The corporation applied for a rehearing upon the ground that, in holding the contract void, the Court was practically overruling certain of its prior decisions. In disposing of the petition for a rehearing, the Court rendered the following opinion:

> "On petition for rehearing, appellee challenges our holding that the contract in suit, because of appellee's failure to comply with the laws of Indiana with reference to foreign corporations, is void, and contends that U. S. Construction Co. v. Hamilton Nat. Bank of Ft. Wayne, Ind., 73 Ind. App. 149, 126 N. E. 866, should be overruled. After further consideration of this ques-

tion, we conclude that it was wholly unnecessary, in order to this decision, for us to determine as to whether the contract was void. Where, as here, a foreign corporation has failed to comply with the laws of the state that qualify it to do business in the state, it is sufficient for us to say in the substantial language of the statute, Section 4918, Burns' 1926, that it may maintain no suit either at law or in equity upon any claim, legal or equitable, whether arising out of contract or tort, in any court of this state.

"We therefore withdraw any holding as to the contract being void, and, with this modification, the petition for rehearing is denied."

V.

CONCLUSION.

The main question involved here is the correct construction of *Section 660.* We respectfully urge that the true interpretation is that where the contract is made in the Territory, with a resident thereof, at a time when the foreign corporation has failed to qualify, no Court of the Territory has the pawer to enforce that contract in favor of the corporation if the other party to the contract invokes the statute as a defense. This is the precise situation here.

When it is said that the Courts may enforce such a contract in favor of the corporation if it appears that it has domesticated prior to commencing suit, an interpretation is placed upon the statutory provisions which is not found in the expressed terms and

which completely nullifies the plain intent of *Section 660.*

There is no undue harshness in *Section 660* as it is written. It is the policy adopted in almost all of the states, and it has been repeatedly declared by the Courts that where the foreign corporation deliberately fails to comply with the local law, the Courts will not aid it in its claims or demands against local citizens or residents, regardless of how the advantages between the respective parties lie. If it should incidentally be that the citizen or resident has received benefits under such a contract, neverthelss it is nothing more or less than one of the penalties imposed against the foreign corporation for its violation of the law, and from this point of view the Courts enforce these laws when the legislative policy clearly demands it. There can be no doubt that this policy is universally adopted in the interests and for the protection of local citizens and residents, and not in the interests and for the protection of foreign corporations. The decision in the case at bar deprives residents of Alaska of a definite protection given them by a specific statutory provision, and from this point of view the question involved here is one of wide public interest.

We respectfully ask that appellant's petition for a rehearing be granted.

Dated, August 26, 1930.

HARRY E. PRATT,
LOUIS K. PRATT,
HERMAN WEINBERGER,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, August 26, 1930.

HERMAN WEINBERGER,
Of Counsel for Appellant and Petitioner.

No. 6121

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAN JOAQUIN LIGHT & POWER CORPORATION,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAN JOAQUIN LIGHT & POWER CORPORATION,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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DOCKET

DOCKET 417-J	TITLE OF CASE	ATTORNEYS
SAN JOAQUIN LIGHT & POWER CORPORATION	vs.	Thomas R. Dempsey Howard W. Reynolds For Plaintiff.
UNITED STATES OF AMERICA		..... For Defendant.

UNITED STATES DISTRICT COURT 47

DATE			FILINGS—PROCEEDINGS
Month	Day	Year	
Jul	19	1928	Filed Complaint for recovery income taxes.
"	26	"	" Affid of service by mail compl.
Nov	3	"	Fld Answer on 11/2/28.
April	15	1929	Enter order settg for trial April 19, 1929.
"	17	"	" " contg to Apr. 26, 1929, for trial.
"	26	"	Fld Stip. & Order Contg for term.
Oct.	14	"	Ent ord cont'g to 11/18/29 for settg.
Nov	18	1929	Ent ord setting for trial for 11/19/29.
"	19	"	Ent proc on trial & ent ord cont'g to 12/16/29 at L. A. fur hrg. Fld 14 U. S. exh. Sw 1 US Wits. Ent ord allow'g certain amendments to complaint & answer which are made by counsel. Fld stip waiving jury.
Dec	16	1929	Ent ord contg further trial to 12/23/29.
Dec	23	1929	Ent proc. on further trial at Los Angeles & ent ord for entry of Judg. favor of plf. for $9700 (or thereabouts) with costs, if entitled thereto by law, and for entry of judg. for deft as to balance, counsel for plf. to prepare findings & judg. Ent. ord. allow Gov. to amend answer which is amended accordingly. Fld 1 plf. exh. Fld. 1 deft ex.

"	31 "	Fld. ptf's findings of fact & conclusions of law.
Jan	10 1930	Ent judgt. favor ptf for $9751.07 with int from 3/15/30 at 6% plus costs, in JBk 2/27. Dock & Ind. judgt.
Mar	14 1930	Fld assign of errors. Fld petn for appeal.
Mar	13 1930	Md for JR c min 11/19/29—12/23/29, c judgt, int JB 2/27. Dock & Index 1/10/30. Cert under seal & fld JR. Closed.
Mar	18 1930	Fld citation on appeal sgd by Judge James & rect of service thereon, ret 4/12/30. Fld ptf's prae for transc of record. Fld cost bond on appeal.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

SAN JOAQUIN LIGHT & POWER CORPORATION,	
Plaintiff and Appellant	
v.	At Law No. 417-J.
UNITED STATES OF AMERICA,	CITATION
Defendant and Appellee	

UNITED STATES OF AMERICA SS: TO UNITED STATES OF AMERICA AND TO ITS ATTORNEYS, WILLIAM D. MITCHELL, ESQ., S. W. McNABB, ESQ., H. G. BALTER, ESQ. and ALVA C. BAIRD, ESQ., GREETING:

You and each of you are hereby notified that in that certain case in the District Court of the United States for the Southern District of California, Northern Division,

wherein the San Joaquin Light & Power Corporation is complainant and United States of America is defendant, an appeal has been allowed the plaintiff therein to the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby cited and admonished to be and appear in said court at San Francisco, California on April 12, 1930 to show cause, if any there be, why the order and decision appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable William P. James Judge of the District Court of the United States for the Southern District of California, Northern Division, this 14th day of March, A. D., 1930.

Wm P. James
Dist. Judge, signing in lieu of
Judge Henning, resigned

Service and receipt of a copy of the
foregoing citation acknowledged this
18 day of March 1930.
S. W. McNabb
Harry Graham Balter

[Endorsed]: United States Circuit Court of Appeals For the Ninth Circuit San Joaquin Light & Power Corporation Appellant vs. United States of America Appellee Filed Mar 18 1930 R. S. Zimmerman Clerk By Edmund L. Smith Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION.

SAN JOAQUIN LIGHT AND POWER CORPORATION, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	At Law. No. 417-J COMPLAINT. FOR RECOVERY OF INCOME TAXES.

The plaintiff herein, for cause of action against the defendant herein, complains and alleges:

I.

That at all times herein mentioned the defendant, United States of America, was and still is a sovereign body politic.

II.

That at all times herein mentioned the plaintiff, San Joaquin Light and Power Corporation, was and still is a corporation duly organized and existing under and by virtue of the laws of the State of California and having its principal office and place of business at the City of Fresno, County of Fresno, State of California, and within the First Internal Revenue Collection District of said State of California. That the plaintiff has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government, or aided or abetted in any manner, or given comfort to, any sovereign or government that is or ever has been at war with the United States.

III.

Plaintiff is informed and believes, and on such information and belief alleges that at the time of the erroneous and illegal collection from the plaintiff and disbursement to the defendant of the taxes hereinafter referred to, Justus S. Wardell was the duly appointed, qualified and acting Collector of Internal Revenue in and for said First Collection District of California, and maintained his office as such Collector in the City and County of San Francisco, in said State of California; and that said Justus S. Wardell is not, at the time of the commencement of this suit, in office as such Collector of Internal Revenue.

IV.

That no action upon the claim herein referred to, other than herein set forth, has been taken before Congress or by any of the departments of the Government of the United States, or in any court other than by this complaint filed herein; that no assignment or transfer of said claims has ever been made and plaintiff is the sole owner thereof; that the plaintiff is justly entitled to the amount herein claimed from the defendant and there are no just credits or offsets against said claims which are known to the plaintiff.

V.

That within the time allowed by law therefor and on or about the 1st day of April, 1918, the plaintiff filed with said Justus S. Wardell, Collector of Internal Revenue at San Francisco, its income and profits tax return for the year 1917, wherefrom it appeared that the liability of the plaintiff for such taxes for said year 1917 was in the sum of $28,571.32, which sum was paid by the plaintiff to said Collector of Internal Revenue on or about the 20th day

of August, 1918; that within the time allowed by law therefor, and on or about the 19th day of February, 1923, the plaintiff, in accordance with the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, filed with the Commissioner of Internal Revenue, through the office of said Collector, its claim for refund of $5,121.66, on account of such taxes overpaid by the plaintiff for said year 1917 by reason of its failure to make proper allowance for construction interest entering into the basis for depreciation and on other grounds referred to in said claim for refund; that subsequently and on or about the 28th day of April, 1925, the Commissioner of Internal Revenue issued his Certificate of Overassessment, No. 519954, Schedule No. 13253, wherein and whereby it appeared that the plaintiff had been overassessed in the sum of $2,819.16 and that the tax liability of the plaintiff for said year 1917 amounted to the sum of only $25,752.16 and that said Collector of Internal Revenue had erroneously and illegally collected from the plaintiff the sum of $2,819.16 in excess of the amount of taxes for which plaintiff was legally liable for said year 1917.

VI.

That said claim for refund has never been disallowed or rejected by the defendant or any officer or agency acting in behalf of the defendant, with respect to said sum of $2,819.16, to which this suit relates, or any part thereof.

That plaintiff is informed and believes and on such information and belief alleges that no part of said sum of $2,819.16 so overpaid has been credited against any income, war profits or excess-profits tax then or since due

and collectible from the plaintiff. That the defendant has failed and refused to refund or repay to plaintiff the said sum of $2,819.16 thus erroneously and illegally collected from plaintiff, or any part thereof, and the whole of said sum is unpaid and due from the defendant to the plaintiff, together with interest thereon from the date of the collection thereof, as provided by law.

FOR A SECOND, SEPARATE AND DISTINCT CAUSE OF ACTION AGAINST THE DEFENDANT HEREIN, PLAINTIFF ALLEGES:

I.

Plaintiff adopts, repleads and realleges all of the allegations contained in paragraphs I, II, III and IV of the first Cause of Action hereinabove stated as fully, to all intents and purposes, as if the same were again set forth in full at this place.

II.

That within the time allowed by law therefor and on or about the 15th day of March, 1920, the plaintiff filed with said Justus S. Wardell, Collector of Internal Revenue, at San Francisco, a consolidated income and profits tax return for the year 1919, wherefrom it appeared that the liability of the plaintiff and certain other corporations for such taxes for said year 1919 was in the sum of $117,488.64, which sum was paid by the plaintiff to said Collector of Internal Revenue in four equal installments on or about the following dates, to-wit: March 15th, 1920, June 15th, 1920, September 15th, 1920 and December 14th, 1920; that within the time allowed by law therefor and on or about the 16th day of March, 1925, the plaintiff, in accordance with the provisions of law in that re-

gard and the regulations of the Secretary of the Treasury established in pursuance thereof, filed with the Commissioner of Internal Revenue through the office of said Collector, its claim for the refund of $109,663.90 on account of taxes overpaid by the plaintiff for said year 1919, by reason of the ruling of the Commissioner of Internal Revenue to the effect that certain of said other corporations were not affiliated with the plaintiff and must themselves pay their respective taxes for said year, and on other grounds referred to in said claim for refund; that subsequently and on or about the 13th day of September, 1926, said Commissioner of Internal Revenue issued his Certificate of Overassessment, No. 780641, Schedule No. 21995, wherein and whereby it appeared that the plaintiff had been overassessed in the sum of $105,599.56 and that the total tax liability of the plaintiff for said year 1919 amounted to the sum of $11,889.08, and that said Collector of Internal Revenue had erroneously and illegally collected from plaintiff the sum of $105,599.56, in excess of the amount of taxes for which plaintiff was legally liable for said year 1919.

III.

That said claim for refund has never been disallowed or rejected by the defendant or any officer or agency acting in behalf of the defendant, with respect to said sum of $105,599.56 to which this suit relates, or any part thereof.

That plaintiff is informed and believes, and on such information and belief alleges that no part of said sum of $105,599.56 has been credited against any income, war profits or excess profits tax then or since due and collectible from plaintiff. That the defendant has failed and refused to refund or repay to plaintiff the said sum of

$105,599.56 thus erroneously and illegally collected from plaintiff, or any part thereof, excepting the sum of $71,-498.35 and interest thereon in the sum of $26,687.83; and the balance of $34,101,21 is unpaid and due from the defendant to the plaintiff, together with interest thereon from the date of the collection thereof, as provided by law.

WHEREFORE, the plaintiff prays for judgment against the defendant in the sum of $36,920.37, together with interest thereon from the date of the collection thereof from the plaintiff, and such other and further relief as may to the court seem proper in the premises.

Thomas R. Dempsey
Howard W. Reynolds
Attorneys for Plaintiff

STATE OF CALIFORNIA)
) ss.
COUNTY OF FRESNO)

W. E. Durfey being first duly sworn, on oath says: That he is an officer, to-wit, Secretary of San Joaquin Light and Power Corporation, plaintiff in the foregoing and above entitled action and makes this verification on behalf of said plaintiff; that he has read the within complaint, and knows the contents thereof and that the same is true of his own knowledge, except as to those matters therein stated on his information and belief, and that as to those matters he believes it to be true.

W. E. Durfey

Subscribed and sworn to before me this 5th day of July 1928.

Jean Peterson
Notary Public in and for said County and State.
[Seal]

[Endorsed]: No 417 J Dept No Div In the District Court of the United States Southern District of California Northern Division San Joaquin Light and Power Corporation, Plaintiff, vs. United States of America, Defendant. Complaint. Filed Jul 19 1928 R. S. Zimmerman, Clerk By L. J. Cordes Deputy Clerk Thomas R. Dempsey Howard W. Reynolds Security Building Los Angeles, Calif. Attorneys for Plaintiff.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION

SAN JOAQUIN LIGHT AND POWER CORPORATION,	)	
Plaintiff,	)	
v.	)	At Law No. 417-J
UNITED STATES OF AMERICA,	)	ANSWER.
Defendant.	)	

Comes now the defendant, above-named, and answering plaintiff's complaint in the above-entitled action, admits, denies and alleges as follows:

ANSWERING THE ALLEGATIONS CONTAINED IN PLAINTIFF'S FIRST CAUSE OF ACTION –

I.

Admits the allegations contained in Paragraph I of the first cause of action in said complaint.

II.

Admits the allegations contained in Paragraph II of the first cause of action in said complaint.

III.

Answering the allegations contained in Paragraph III of the first cause of action in said complaint denies that the collection from the plaintiff or disbursements to the defendant of the taxes in said paragraph referred to, was erroneous or illegal; admits the remaining allegations in said Paragraph III.

IV.

Answering the allegations contained in Paragraph IV of the first cause of action of said complaint, denies that plaintiff is justly entitled to the amount or any part thereof in said paragraph claimed from the defendant; alleges that defendant has no information or belief sufficient to enable it to answer the remaining allegations in said paragraph contained and, basing its denial upon such ground, denies generally and specifically each and all of said allegations.

V.

Answering the allegations contained in Paragraph V of plaintiff's first cause of action in said complaint, denies that plaintiff filed its income and profits tax return for the year 1917 on March 30, 1918, but alleges that said return was filed April 1, 1918; denies that plaintiff filed its claim for refund of $5,121.66 on account of said income and profits taxes for the year 1917 on February 17, 1923, but alleges that said claim for refund was filed on February 19, 1923; admits the remaining allegations in said paragraph contained.

VI.

Answering the allegations contained in Paragraph VI. of the first cause of action stated in said complaint, defendant denies that no part of the sum of $2,819.17 in said paragraph mentioned has been credited against net income, war profits or excess profits tax then or since due or collectible from plaintiff, but alleges the fact to be that said sum of $2,819.16 was on or about the month of September, 1926, credited against certain income, war profits and excess profits taxes then due, owing, unpaid and collectible from plaintiff to defendant, to wit, income, war profits and excess profits taxes for the calendar year 1918; defendant denies that such sum of $2,819.16 or any part thereof was erroneously or illegally collected from plaintiff and denies that said sum or any part thereof, or interest thereon, is due from defendant to plaintiff.

ANSWERING THE ALLEGATIONS CONTAINED IN PLAINTIFF'S SECOND CAUSE OF ACTION IN SAID COMPLAINT, PLAINTIFF ADMITS, DENIES AND ALLEGES AS FOLLOWS:

I.

Defendant adopts, repleads and reallages all the allegations, admissions and denials contained in Paragraphs I, II, III and IV hereinabove set forth in its answer to plaintiff's first cause of action, with the same force and effect as if here set forth at length.

II.

Answering the allegations contained in Paragraph II of plaintiff's second cause of action in said complaint, denies that three of the four equal installments in said paragraph mentioned were paid by plaintiff to said Collector of Internal Revenue on June 14, 1920, September

13, 1920 and December 13, 1920, but alleges that said four installments were made on or about the following dates, to wit: March 15, 1920, June 15, 1920, September 15, 1920 and December 14, 1920, respectively; admits that the plaintiff filed with the Commissioner of Internal Revenue its claim for refund of $109,663.90 on account of taxes claimed by plaintiff to have been overpaid for the year 1919; denies that said claim was filed March 13, 1925; alleges that said claim was filed March 16, 1925; denies that plaintiff's taxes for said year 1919 were overpaid in the amount of $109,663.90; admits the remaining allegation in said paragraph contained.

III.

Answering the allegations contained in Paragraph III of the second cause of action in said complaint, the defendant denies that no part of the sum of $105,599.56, in said paragraph mentioned, has been credited against any income, war profits or excess profits tax then or since due or collectible from plaintiff; alleges that of said sum of $105,599.56, the sum of $34,101.21 was on or about the month of September 1926, credited against certain income, war profits and excess profits tax for the calendar year 1918 and alleges that said income, war profits and excess profits tax was then and there due, owing and unpaid from plaintiff to defendant and was then collectible from plaintiff; alleges that the remainder of said sum of $105,599.56. to wit, the sum of $71,498.35, together with interest in the sum of $26,687.83, was paid and refunded to plaintiff; denies that said sum of $34,101.21 or any part thereof was erroneously or illegally collected from plaintiff; denies that said sum of $34,101.21, or interest thereon, is due from defendant to plaintiff.

AND FOR A SECOND AND FURTHER SEPARATE AND DISTINCT DEFENSE TO PLAINTIFF'S FIRST CAUSE OF ACTION IN SAID COMPLAINT, DEFENDANT ALLEGES:

I.

That at all times herein mentioned the defendant, United States of America, was and still is a corporation sovereign and body politic.

II.

That at all times herein mentioned the plaintiff, San Joaquin Light & Power Corporation, was and still is a corporation organized and existing under and by virtue of the laws of the State of California, that its principal office and place of business is at the City of Fresno, County of Fresno, State of California, within the Northern Division of the Southern Judicial District of the State of California.

III.

That plaintiff filed its income and profits tax return for the calendar year 1918 on or about June 16, 1919; that upon a subsequent examination, audit and review, the Commissioner of Internal Revenue determined an additional tax in the sum of $271,490.91 for said year 1918 to be due from plaintiff to defendant and on March 15, 1924, duly assessed against plaintiff said additional tax for said year in the said sum of $271,490.31.

IV.

That on or about February 12, 1924, plaintiff and defendant entered into an agreement, in writing, whereby the period of limitation for determination, assessment and collection of plaintiff's income, excess profits and war profits taxes for the calendar year 1918, was extended for

the period of one year beyond the statutory period, to wit, to and including June 16, 1925;

That on or about August 29, 1924, plaintiff and defendant entered into a written agreement whereby the period of limitation for collection of income, excess profits and war profits taxes due from plaintiff to defendant for said year 1918 was extended for the period of one year after the expiration of the statutory period of limitation therefor, or the statutory period as extended by any waivers then on file with the Bureau of Internal Revenue within which assessments of taxes might have been made for said year.

V.

That on or about April 8, 1924, plaintiff filed its claim in abatement of said sum of $271,490.31, additional income and profits taxes for said year 1918, assessed as aforesaid; that by reason of the filing of said claim in abatement the collection of said additional income and profits taxes in the said sum of $271,490.31 was stayed and delayed pending the determination of said claim in abatement and until the actual collection of the rejected portion thereof in the manner more fully hereinafter set forth.

VI.

That on or about September 13, 1926, the Commissioner of Internal Revenue duly rejected said claim in abatement in the sum of $36,920.36 and allowed said claim in abatement as to the balance thereof, leaving the said sum of $36,920.37 additional income and profits taxes for the calendar year 1918 then and there due, owing and unpaid from plaintiff to defendant; that said sum remained

due, owing and unpaid until satisfied by the application of a credit as more fully hereinafter set forth.

VII.

That on or about April 1, 1918, plaintiff filed its income and excess profits tax return for the calendar year 1917 showing a liability for such taxes for said year in the sum of $28,571.32, which sum was paid to defendant August 20, 1918.

VIII.

That thereafter the Commissioner of Internal Revenue duly determined the correct income and profits tax liability of plaintiff for the calendar year 1917 to be $25,752.16, duly issued his certificate of overassessment of said tax for said year 1917 in the sum of $2,819.16 and on or about February 2, 1926, duly signed his refund schedule therefor; that the said sum of $2,819.16 was thereafter, to wit, on or about March 11, 1925, duly applied and credited by defendant against the balance of $36,920.37, additional income and profits taxes for the year 1918, hereinabove mentioned.

AND FOR A SECOND AND FURTHER SEPARATE AND DISTINCT DEFENSE TO PLAINTIFF'S SECOND CAUSE OF ACTION IN SAID COMPLAINT DEFENDANT ALLEGES AS FOLLOWS:

I.

Defendant hereby refers to, repleads and adopts the allegations contained in Paragraphs I, II, III, IV, V and VI of defendant's second defense to plaintiff's first cause of action herein above set forth with the same force and effect as if here set forth at length.

II.

That on or about March 15, 1920, plaintiff filed its income and profits tax return for the calendar year 1919 showing a liability for said tax in the sum of $117,488.64; that said sum was paid by plaintiff to defendant in four equal installments on or about the following dates, to wit: March 15, 1920, June 15, 1920, September 15, 1920, and December 14, 1920.

III.

That thereafter the Commissioner of Internal Revenue duly determined the correct income and profits tax liability of plaintiff for said calendar year 1919 to be $11,-889.08, duly issued his certificate of overassessment of said tax for said year 1919 in the sum of $105,599.56. and on or about September 13, 1926, signed his refund schedule therefor; that of said sum of $105,599.51 the sum of $34,101.21 was on or about the month of September 1926, duly credited and applied by defendant against the balance of $36,920.37 additional income and profits taxes for the calendar year 1918, and the remaining portion thereof, to wit, the sum of $71,498.35, together with interest in the sum of $26,687.83, was duly refunded to plaintiff;

WHEREFORE, defendant prays that plaintiff take nothing by its complaint; for judgment against plaintiff for its costs herein; and for such other relief as may be proper in the premises.

SAMUEL W. McNABB,
United States Attorney.
Emmett E Doherty
Assistant United States Attorney.

[Endorsed]: Original No. 417-J. In the District Court of the United States for the Southern Dist. of

California Northern Division San Joaquin Light & Power Corp. vs. United States of America. Answer. Received copy of the within answer this 2d day of Nov., 1928 Thomas R. Dempsey M C Attorney for Plaintiff Filed Nov– 3, 1928 R. S. Zimmerman, Clerk. By L. J. Cordes, Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION.

SAN JOAQUIN LIGHT & POWER CORPORATION, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	AT LAW. NO. 417-J. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled cause coming on for trial at the City of Fresno, State of California, on the 19th day of November, 1929 and for a further hearing at the City of Los Angeles, State of California on the 23rd day of December, 1929, and having been tried before the above entitled court without a jury (a jury having been waived by written stipulation), Thomas R. Dempsey, Esq., and A. Calder Mackay, Esq., appearing for the plaintiff, and H. G. Balter, Esq. and Alva C. Baird, Esq., appearing for the defendant, and after hearing the allegations and proofs of the parties, the arguments of counsel and being

advised in the premises, the following Findings of Fact and Conclusions of Law stating the decision of the court in said action are hereby made and filed:

I.

That at all times herein mentioned the defendant, United States of America, was and still is a sovereign body politic.

II.

That at all times herein mentioned the plaintiff, San Joaquin Light & Power Corporation, was and still is a corporation duly organized and existing under and by virtue of the laws of the State of California and having its principal place of business at the City of Fresno, in the County of Fresno, State of California, within the Northern Division of the Southern Judicial District of the State of California and within the First Internal Revenue Collection District of said State of California. That the plaintiff has at all times borne true allegiance to the government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said government or aided or abetted in any manner or given comfort to any sovereign or government that is or ever has been at war with the United States.

III.

That at the time of the collection from the plaintiff and the disbursement to the defendant of the taxes hereinafter referred to, Justus S. Wardell was the duly appointed, qualified and acting Collector of Internal Revenue in and for said First Collection District of California and maintained his office as such Collector in the City and County of San Francisco, in said State of California; and that said Justus S. Wardell was not at the time of the com-

mencement of this suit in office as such Collector of Internal Revenue.

IV.

That no action upon the claims hereinafter referred to, other than as herein set forth, has been taken before Congress or by any of the departments of the government of the United States or in any court other than by this suit; that no assignment or transfer of said claims has ever been made and plaintiff is the sole owner thereof.

V.

That on April 1, 1918, the plaintiff filed with said Justus S. Wardell, Collector of Internal Revenue at San Francisco, California, its income and profits tax return for the calendar year 1917 showing a liability for such taxes for said year in the sum of $28,571.32, which sum was paid by the plaintiff to said Collector of Internal Revenue on August 20, 1918. That on February 19, 1923, the plaintiff filed with the Commissioner of Internal Revenue through the office of said Collector, its claim for refund of $5,121.66 on account of such taxes overpaid by the plaintiff for said year 1917 upon certain grounds set forth in said claim for refund. That on February 2, 1925, the Commissioner of Internal Revenue determined the correct income and profits tax liability for the plaintiff for the calendar year 1917 to be $25,752.16 and issued his Certificate of Overassessment of said tax for said year 1917 showing that the plaintiff had been overassessed in the sum of $2,819.16 and that said Collector of Internal Revenue had collected from the plaintiff the said sum of $2,819.16 in excess of the amount of such taxes for which plaintiff was legally liable for said year 1917. That said claim for refund has never been disallowed or rejected by

the defendant or any officer or agency acting in behalf of the defendant, with respect to said sum of $2,819.16 or any part thereof; that said sum of $2,819.16 so overpaid by the plaintiff for said year 1917 was, on March 11, 1925 credited by the Commisioner of Internal Revenue against income, war profits and excess profits taxes assessed against the plaintiff for the taxable year 1918 on March 15, 1924.

VI.

That on March 15, 1920 the plaintiff filed with said Justus S. Wardell, Collector of Internal Revenue at San Francisco, California a consolidated income and profits tax return for the calendar year 1919, wherefrom it appeared that the liability of the plaintiff and certain other corporations for such taxes for said year 1919 was in the sum of $117,488.64, which sum was paid by the plaintiff to said Collector of Internal Revenue in four equal installments on the following dates, to-wit: March 15, June 15, September 15 and December 14, all in the year 1920; that within the time allowed by law and on March 16, 1925 the plaintiff filed with the Commissioner of Internal Revenue through the office of said Collector, its claim for the refund of $109,663.90 on account of taxes overpaid by the plaintiff for said year 1919. That on September 13, 1926 said Commissioner of Internal Revenue determined the correct income and profits tax liability of the plaintiff for said calendar year 1919 to be $11,889.08 and thereupon issued his Certificate of Overassessment of said tax for said year 1919 in the sum of $105,599.56 and determined that said Collector of Internal Revenue had collected from the plaintiff the sum of $105,599.56 in excess

of the amount of such taxes for which plaintiff was legally liable for said year 1919.

VII.

That said claim for refund has never been disallowed or rejected by the defendant or any officer or agency acting on behalf of the defendant with respect to said sum of $105,599.56 or any part thereof, except that of said sum of $105,599.56 so overpaid by the plaintiff for said taxable year 1919, the sum of $34,101.21 was on September 13, 1926 credited against income, war profits and excess profits taxes assessed on March 15, 1924 against the plaintiff for the taxable year 1918. The balance thereof, to-wit, the sum of $71,498.35 with interest thereon in the sum of $26,687.83 was refunded by the defendant to the plaintiff during 1926.

VIII.

That on June 16, 1919 the plaintiff filed its consolidated income and profits tax return for the calendar year 1918 and for said year plaintiff paid as taxes to the defendant through said Collector of Internal Revenue the sum of $14,647.18, which was paid on the dates and in the amounts as follows:

March 13, 1919	$9,852.68
Sept. 13, 1919	1,132.70
Dec. 10, 1919	1,138.67
Dec. 12, 1919	2,523.13
	14,647.18

That upon a subsequent examination, audit and review, the Commissioner of Internal Revenue determined an additional tax in the sum of $271,490.31 for said year 1918

to be due from the plaintiff to the defendant and on March 15, 1924 duly assessed against the plaintiff said additional tax for said year 1918 in the said sum of $271,490.31.

IX.

That notice and demand for said $271,490.31 assessed as aforesaid on March 15, 1924 was duly made upon plaintiff by the Collector of Internal Revenue on March 25, 1924; that on April 5, 1924 plaintiff duly filed its claim in abatement, without bond, for said sum of $271,490.31; that said claim in abatement was on September 13, 1926 by the Commissioner of Internal Revenue rejected in respect to $36,920.36 of the amount claimed, and allowed as to the balance thereof; that on September 13, 1926 there was applied by defendant against the unabated assessment of $36,920.36 the sum of $34,101.21 representing the amount overpaid by the plaintiff for the year 1919 and evidenced by the Certificate of Overassessment issued to the plaintiff for the year 1919 as aforesaid; that no suit or proceeding to collect said tax of $271,490.31 or any part thereof was instituted subsequent to the filing of said claim in abatement, other than by crediting overpayments for the taxable years 1917 and 1919 as aforesaid against said outstanding tax liability for the taxable year 1918 during the month of September, 1926 as aforesaid.

X.

That in rejecting plaintiff's claim in abatement to the extent of $36,920.36 and determining that said sum represented the unpaid tax liability of plaintiff for the year 1918 the Commissioner of Internal Revenue did not take into account the fact that the sum of $14,647.18 had been paid, on account of income and profits taxes for the year 1918 during the year 1919 as aforesaid; that of this sum

of $14,647.18 plaintiff has had returned to it only the sum of $4,896.11, and there remains due to plaintiff the sum of $9,751.07.

XI.

That there was executed by plaintiff and the Commissioner of Internal Revenue a written instrument in words and figures as follows, to-wit:

"February 12, 1924
(Date)

INCOME AND PROFITS TAX WAIVER

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, ... San Joaquin Light & Power Corp....., of Fresno, California and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said corporation for the years 1917 and 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes', approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the

Bureau, within which assessments of taxes may be made for the year or years mentioned.

SAN JOAQUIN LIGHT & POWER CORP.

(SEAL) Taxpayer

By A. E. Peat, Treas.

By O. L. Whitehill, Asst. Secy.

D. H. Blair

Commissioner

C.D.H.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed."

XII.

That there was executed by plaintiff and the Commissioner of Internal Revenue a written instrument in words and figures as follows, to-wit:

"August 29, 1924
(date)

INCOME AND PROFITS TAX WAIVER

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, San Joaquin Light & Power Corporation, of Fresno, California and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said San Joaquin Light & Power Corporation for the years 1918 and 1919

under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled, 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes', approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

San Joaquin Light & Power Corp.,
Taxpayer

(SEAL) By (Signed) W. E. Durfey
Asst. Sec'y.

(Signed) D. H. Blair
Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed."

CONCLUSIONS OF LAW.

I.

That plaintiff is entitled to judgment against the defendant in the sum of $9,751.07, together with interest thereon at the legal rate of six (6) per cent per annum from March 15, 1920, plus the costs of this action in the

sum of $13.00 representing filing fees paid to the court clerk.

II.

That the instruments designated "waivers" signed by plaintiff and the Commissioner of Internal Revenue extended the period of assessment and collection of the additional taxes for the year 1918 to June 16, 1926 and therefore, under the provisions of Section 278 (d) of the Revenue Act of 1926 the Commissioner of Internal Revenue had six years after the date of the assessment within which to enforce the collection of said additional taxes for the year 1918.

III.

That the claim in abatement filed by plaintiff stayed collection of the additional taxes for the year 1918 and therefore, under the provisions of Sec. 611 of the Revenue Act of 1928 the action of the Commissioner of Internal Revenue in crediting against the additional taxes for the year 1918 the sum of $22,273.18 was legal and correct.

Let judgment be entered accordingly.

Dated at Los Angeles, California, December 31st, 1929.

Edward J. Henning
Judge.

Approved as to form as provided in Rule 44, Subject, however to defendant's right to urge inclusion of additional findings of fact

SAMUEL W. MCNABB,
United States Attorney,
Harry Graham Balter
HARRY GRAHAM BALTER,
Assistant United States Attorney

[Endorsed]: No 417-J In the District Court of the United States Southern District of California Northern Division San Joaquin Light & Power Corporation, Plaintiff, v. United States of America, Defendant. Findings of Fact and Conclusions of Law. Filed Dec 31 1929 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk Thomas R. Dempsey A. Calder Mackay Security Building Los Angeles, Calif, Attorneys for Plaintiff.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION.

SAN JOAQUIN LIGHT & POWER CORPORATION,	)	
Plaintiff,	)	
	)	No. 417-J
v.	)	JUDGMENT.
UNITED STATES OF AMERICA,	)	
Defendant.	)	

This cause came on regularly for trial at the City of Fresno, State of California, on the 19th day of November, 1929 and for a further hearing at the City of Los Angeles, State of California on the 23rd day of December, 1929, Thomas R. Dempsey, Esq., and A. Calder Mackay, Esq., appearing as counsel for plaintiff, and H. G. Balter, Esq. and Alva C. Baird, Esq. appearing as counsel for defendant. A trial by jury having been waived by counsel for the respective parties, the cause was tried before the Honorable Judge Edward J. Henning sitting without a

jury, whereupon witnesses were examined and evidence was produced on behalf of the parties, and the evidence being closed, the cause was submitted to the court for consideration and decision; and after due deliberation thereon the court in open court gave judgment for the plaintiff in the sum of $9,751.07, together with interest thereon at the legal rate of six per cent per annum from March 15, 1920, together with costs of court in the sum of $13.00, and denied judgment for the balance of the amount sought in plaintiff's complaint, and thereafter, the Honorable Judge Edward J. Henning having signed the Findings of Fact and Conclusions of Law ordered that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the decision aforesaid, it is hereby ORDERED AND ADJUDGED that the plaintiff, San Joaquin Light & Power Corporation, do have and recover of and from the defendant the sum of $9,751.07, together with interest thereon at the legal rate of six per cent per annum from the 15th day of March, 1920, plus costs of court in the sum of $13.00;

It is further ORDERED AND ADJUDGED that the plaintiff do not recover from the defendant the balance of the amount claimed in its complaint.

JUDGMENT ENTERED JANUARY 10th, 1930.

R. S. ZIMMERMAN, Clerk,
By Francis E. Cross
Deputy Clerk.

[Endorsed]: No 417-J In the District Court of the United States Southern District of California Northern Division San Joaquin Light & Power Corporation, Plain-

tiff, v. United States of America, Defendant. Judgment. Filed Jan. 10, 1939 R S Zimmerman, Clerk. Thomas R. Dempsey A. Calder Mackay Security Building Los Angeles. Calif. Attorneys for Plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION.

SAN JOAQUIN LIGHT & POWER CORPORATION, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	No. 417-J PETITION FOR APPEAL

The above named plaintiff feeling itself aggrieved by that portion of the judgment of the United States District Court for the Southern District of California, Northern Division, denying plaintiff judgment against the defendant in the sum of Twenty-two Thousand, Two Hundred Seventy-three Dollars and Eighteen Cents ($22,273.18) together with legal interest, entered in this cause on the 10th day of January, 1930, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith and plaintiff prays that its appeal be allowed and that citation issue as provided by law and that a transcript of the record, pro-

ceedings and papers upon which said judgment is based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security for costs to be required of it to perfect its appeal be made.

Thomas R. Dempsey
Thomas R. Dempsey
A. Calder Mackay
A. Calder Mackay
Howard W. Reynolds
Attorneys for Petitioner.

The petition granted and the appeal allowed upon giving bond conditioned as required by law in the sum of $300—

Wm. P. James
Dist. Judge.

[Endorsed]: No 417-J In the District Court of the United States Southern District of California Northern Division San Joaquin Light & Power Corporation, Plaintiff v. United States of America, Defendant, Petition for Appeal. Filed Mar 14 1930 R. S. Zimmerman R. S. Zimmerman, Clerk Thomas R. Dempsey A Calder Mackay Security Building Los Angeles, Calif, Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION.

SAN JOAQUIN LIGHT & POWER CORPORATION, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	No. 417-J ASSIGNMENT OF ERRORS.

Comes now the plaintiff by its attorneys, Thomas R. Dempsey, A. Calder Mackay and Howard W. Reynolds, and says that the judgment entered in the above entitled cause on the 10th day of January, 1930 is erroneous and unjust to plaintiff in that:

FIRST: The trial court erred in holding that the Commissioner of Internal Revenue had six years subsequent to March 15, 1924, the date of the assessment of additional taxes for the year 1918, within which to collect additional taxes for said year.

SECOND: The trial court erred in holding that the collection of additional taxes for the year 1918 was stayed by the filing of a claim for the abatement of the assessment made on March 15, 1924 for additional taxes for the year 1918.

THIRD: The trial court erred in failing and refusing to hold that plaintiff's liability for additional taxes for the year 1918 as asserted by the Commissioner of Internal Revenue became extinguished at the close of June 16, 1926.

FOURTH: The trial court erred in holding that the action of the Commissioner of Internal Revenue in crediting on September 13, 1926 the sum of $22,273.18, representing taxes overpaid by plaintiff for the years 1917 and 1919, against additional taxes then asserted for the year 1918, was legal and correct.

FIFTH: The trial court erred in failing to give plaintiff judgment for the full amount claimed in its complaint, to-wit, the sum of $36,920.36, plus interest as provided by law.

WHEREFORE plaintiff prays that this appeal be allowed and that the United States Circuit Court of Appeals for the Ninth Circuit may review the action of the trial court in this cause, reverse that portion of its decision denying plaintiff the relief sought and direct the entry of a decision by said court in favor of plaintiff for the sum of $22,920.36, together with interest as provided by law, and for such other and further relief as may be deemed meet and proper in the premises.

Thomas R. Dempsey
Thomas R. Dempsey
A. Calder Mackay
A. Calder Mackay
Howard W. Reynolds
Attorneys for plaintiff

[Endorsed]: No. 417-J In the District Court of the United States Southern District of California Northern Division San Joaquin Light & Power Corporation, Plaintiff v. United States of America, Defendant. Assignment of Errors. Filed Mar 14 1930 R. S. Zimmerman, R. S. Zimmerman, Clerk Thomas R. Dempsey A. Calder Mackay Security Building Los Angeles, Calif Attorneys for Plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION.

SAN JOAQUIN LIGHT & POWER CORPORATION, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	AT LAW. No. 417-J. APPEAL BOND FOR COSTS.

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned, Fidelity and Casualty Company of New York, a corporation duly organized and existing under and by virtue of the laws of the State of New York and duly licensed to transact its business in the State of California, as surety is held and firmly bound unto the United States of America in the full and just sum of Three Hundred Dollars ($300.00) to be paid to the said United States of America, its attorneys, successors or assigns, to which payment well and truly to be made the undersigned binds itself, its successors and assigns by these presents.

Signed and dated this 17th day of March, A. D. 1930.

Whereas, lately at a regular term of the District Court of the United States for the Southern District of California, Northern Division, sitting at the City of Fresno, in said District, in a suit pending in said Court between San Joaquin Light & Power Corporation, as plaintiff, and the United States of America, as defendant, Cause No.

417-J, on the law docket of said Court, final judgment was rendered against the said plaintiff denying the right of the said plaintiff to recover against the defendant in the sum of Twenty-two Thousand Two Hundred Seventy-three Dollars and Eighteen Cents ($22,273.18), together with legal interest, which judgment was entered on the 10th day of January, 1930, and the said plaintiff has obtained an appeal to reverse the judgment of said Court in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing it to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco, State of California on the 12th day of April, A. D. 1930.

Now, the condition of the above obligation is such that if the said San Joaquin Light & Power Corporation shall prosecute its appeal to effect and answer all costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

IN WITNESS WHEREOF, the undersigned, Fidelity and Casualty Company of New York has caused its name to be subscribed and its corporate seal to be affixed hereunto by its proper attorney thereunto duly authorized.

FIDELITY AND CASUALTY COMPANY
OF NEW YORK

[Seal] By William E. Fortney
Attorney in Fact

Approved this 18 day of March, A. D. 1930.
Wm. P. James
District Judge,
signing for Henning, J, Resigned.

Examined and recommended for approval as provided in Rule 28.

Howard W. Reynolds
Attorney.

State of California }
County of Los Angeles } ss.

On this 17th day of March in the year One Thousand Nine Hundred and Thirty before me, F. W. Weitzel a Notary Public in and for the said.....County of Los Angeles residing therein, duly commissioned and sworn, personally appeared William E. Fortney known to me to be the ATTORNEY of THE FIDELITY and CASUALTY COMPANY OF NEW YORK, the Corporation that executed the within instrument, and known to me to be the person who executed the said instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal in the County of Los Angeles the day and year in this certificate first above written.

[Seal] F. W. Weitzel
Notary Public in and for the.....County of Los Angeles State of California.

[Endorsed]: No 417-J In the District Court of the United States Southern District of California Northern Division San Joaquin Light & Power Corporation, Plaintiff, v. United States of America, Defendant. Appeal Bond for Costs. Filed Mar 18 1930 R. S. Zimmerman Clerk By Edmund L. Smith Deputy Clerk Thomas R. Dempsey Howard W. Reynolds A. Calder Mackay Security Building Los Angeles, Calif. Attorneys for Plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION.

SAN JOAQUIN LIGHT & POWER CORPORATION, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	No. 417-J PRAECIPE.

TO THE CLERK OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION:

The plaintiff above named, having perfected an appeal in this cause to the United States Circuit Court of Appeals for the Ninth Circuit, hereby requests you to prepare, at plaintiff's expense, a transcript of the record on appeal in this cause, including therein the following papers and proceedings which it is requested you transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

(1) Docket entries of proceedings before the District Court.

(2) All pleadings before the District Court.

(3) Findings of Fact and Conclusions of Law.

(4) Judgment of the Court.

(5) Petition for and order allowing appeal and fixing amount of bond.

(6) Assignment of Errors.

(7) Bond on appeal for costs.
(8) Praecipe for transcript of record.
(9) Citation on Appeal.
(10) The Clerk's certification of record.

Thomas R. Dempsey
Thomas R. Dempsey
A. Calder Mackay
A. Calder Mackay
Howard W. Reynolds
Attorneys for Plaintiff

Service of this Praecipe acknowledged this 18 day of March, 1930.

Harry Graham Balter
H. G. Balter
Samuel W. McNabb
S. W. McNab
Attorneys for Defendant.

[Endorsed]: No 417-J In the District Court of the United States Southern District of California Northern Division San Joaquin Light & Power corporation, Plaintiff, v. United States of America, Defendant. Praecipe. Filed Mar 18 1930 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk Thomas R. Dempsey, A. Calder Mackay Security Building Los Angeles, Calif. Attorneys for Plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION.

SAN JOAQUIN LIGHT & POWER CORPORATION, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	CLERK'S CERTIFICATE

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 39 pages numbered from 1 to 39, inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the docket entries of proceedings before the District Court; citation; complaint; answer; findings of fact and conclusions of law; judgment; petition for appeal and order allowing appeal; assignment of errors; appeal bond for costs and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to.....

and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Northern Divsiion, this..... day of April, in the year of Our Lord One Thousand Nine Hundred and Thirty, and of our Independence the One Hundred and Fifty-fourth.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.